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IN THE

Supreme Court of the United States

October Term, 1959.
No. 873.

JAMES A. GAINEY and J. L. YOUNG, Individually and on Behalf of Others Similarly Affected,
Petitioners,

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
and
THE PENNSYLVANIA RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LAWRENCE J. RICHETTE,
MEEHAN, NEIL & RICHETTE,
2210 Girard Trust Building,
Philadelphia 2, Penna.,
Counsel for Petitioners.

Martin & Lyle, 1025 Bankers Securities Bldg., Phila. 7, Pa.

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CITATION TO OPINIONS BELOW.

The opinion of the District Court, printed as Appendix A page 13 is reported at 177 F. Supp. 421. The opinion of the Court of Appeals is printed as Appendix B page 32, and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered February 24, 1960, and its denial of a Petition for Rehearing and for an Order Clarifying its Judgment, Directing the Lower Court to Allow Plaintiffs to Amend Their Complaint, was entered on March 23, 1960.

This petition for a Writ of Certiorari was filed less than 60 days after the entry of the judgment below.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254 (1). (Appendix I.)

QUESTIONS PRESENTED.

1. Where a wage agreement involving bonus payments is in existence, and a carrier and a union negotiate a new agreement the terms of which are more favorable to the workers, and the carrier with the tacit consent of the union unilaterally terminates the existing agreement and refuses to place in effect the new one, is this a dispute over which the National Railroad Adjustment Board has primary jurisdiction or is it one cognizable in a United States District Court?

2. In the cause of action in the instant case, where the employees charge their union with discrimination in violation of the Railway Labor Act, alleging that the union refused to heed this complaint for ten years, does the Railway Labor Act require these workers to exhaust internal union remedies before seeking judicial relief?

STATUTES INVOLVED.

The pertinent provisions of the Railway Labor Act, 45 U. S. C. are Sections 152 Seventh, 153 First (a) (b) (c) (g) (i); 153 Second, 155 First (a), 156, set forth in Appendix D page 39.

Labor-Management Rep. and Discl. Act of 1959 (29 U. S. C. A. 401) Appendix E page 42.

STATEMENT OF THE CASE.

In 1941 The Brotherhood of Railway and Steamship Clerks, Etc., Petitioners' statutory representative, and the Pennsylvania Railroad placed in effect an agreement which provided bonuses over and above hourly rated compensation for Tallymen on the Eastern Region of the Pennsylvania Railroad (52-53).

In 1949 the carrier and the Brotherhood negotiated again regarding this collective bargain; this time the Eastern Region Tallymen were to receive monthly salaries equal to those paid tallymen in the Central Region ($269.17) with the same fringe benefits of annual paid vacation and sick leave (53).

However, in 1950 the carrier unilaterally terminated the existing agreement as to bonuses and did not place in effect any equalization of pay agreement, thus relegating the Petitioners to the inferior earnings of 1941 (54).

Petitioners protested this action to the carrier. It was ignored. Petitioners sought to have their union protest the action of the carrier. The union not only refused to process this dispute as provided by the Railway Labor Act or to seek judicial relief, but it punished the Petitioners for their efforts to redress this wrong by dissolving their locals in the Eastern Region (50-68).

To this day, Petitioners are hourly rated employees, earning less money than their counterparts in this craft on other

regions of the Pennsylvania Railroad. To date, because the Pennsylvania Railroad and the Brotherhood have failed to put into effect a new salary equalization agreement, the Petitioners have suffered earning losses in excess of $2,000,000 (49-50).

After waiting ten years for their union to redress this statutory violation, the Petitioners representing a class of 600 workers brought this action against their union and the carrier in the District Court for the Eastern District of Pennsylvania, seeking injunctive relief and damages.

The defendant railroad filed a motion to dismiss, alleging, inter alia, that exclusive jurisdiction of this problem was in the National Railroad Adjustment Board and that the Plaintiffs had failed to exhaust their administrative remedies.

The defendant union filed a motion to dismiss, raising the same jurisdictional question as the carrier, and said further that the Petitioners had not exhausted internal union remedies.

The District Court made a factual finding on the basis of the complaint and held no new collective bargain had been made; but that in any event the problem was one of *interpretation of an agreement* for which the Railway Labor Act had a remedy: the National Railroad Adjustment Board, citing *Pa. R. Co. v. Day*, 360 U. S. 548 (1959) and *Union Pac. R. Co. v. Price*, 360 U. S. 601 (1959).

The District Court said that even if a new collective bargain had been consummated, the court could not have jurisdiction. It then reviewed the discrimination cases and rejected the following authorities as being inapplicable: *Steele v. Louisville & N. R. R.*, 323 U. S. 192 (1944); *Tunstall v. Brotherhood of L. F. & E.*, 323 U. S. 210 (1944); *Conley v. Gibson*, 355 U. S. 41 (1957). Instead, the District Court cited *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), for the proposition that Petitioners had failed to exhaust statutory remedies.

As to the union, the District Court held that Petitioners had failed to exhaust internal union remedies as a prerequisite to judicial relief. Thus the Complaint was dismissed. 177 F. Supp. 421.

The Third Circuit Court of Appeals affirmed the lower court, reiterating that the collective bargain as such was for the court to determine from the Complaint, but that in any event it was a question of interpretation or application of an agreement and hence a problem for the National Railroad Adjustment Board, citing the *Day* and *Price* cases (supra). It also said that Petitioners had failed to exhaust internal union remedies and hence were out of court on that point.

Petitioners petitioned the Circuit Court for rehearing and for Clarification of Judgment, to allow them to file an amended Complaint. This was denied.

Thus both courts below hold that a District Court has no jurisdiction over a class action against a statutory representative *and* a carrier where a wage agreement is terminated without first putting into effect a new collective bargain.

REASONS FOR GRANTING THE WRIT.

1. The District Court of the Eastern District of Pennsylvania and the Third Circuit Court of Appeals have decided an important federal question, involving the interpretation of a federal statute directly in conflict with decisions of the Sixth and Seventh Circuits.

The doctrine has been well established since *Elgin v. Burley*, 325 U. S. 711 (1945) that a "minor" dispute in the railroad industry involves the interpretation or application of an *existing* agreement; and hence under the Railway Labor Act such a dispute has its primary jurisdiction in the National Railroad Adjustment Board. *State of California v. Taylor*, 353 U. S. 553 (1957).

Accordingly, the "major" disputes—those dealing with the making of the actual collective bargain—are left to the carriers and statutory representatives to negotiate, failing which the Railway Labor Act provides for Mediation, Conciliation and Arbitration.

Thus, in *Hunter v. Atchison T. & S. F. Ry. Co.*, 171 F. (2d) 594 (1948), Seventh Circuit, the court said at page 599:

> "In reality what the (National Railroad Adjustment) Board did was not merely to exercise its statutory authority to interpret or apply the contract as it existed, but to make a new and different contract between the brakemen and the carrier" (reversed on other grounds).

And in *Thomas v. N. Y. Chicago & St. Louis R. Co.*, 185 F. (2d) 614 (1950), Sixth Circuit, the court said at page 617:

> "Although the National Railroad Adjustment Board has jurisdiction to hear an individual's grievance, it is not authorized to write a contract for parties nor to create substantive legal rights."

The lower courts in the instant case failed to distinguish between "minor" and "major" disputes, and perceiving the question as one involving the interpretation of a contract, relegated the Petitioners to the National Railroad Adjustment Board for relief.

Clearly the lower courts are out of step with the Sixth and Seventh Circuits, and the decisions of these lower courts should be reviewed by this Court.

2. Though this Court has not faced a factual situation calling for a judicial determination of whether a dispute in the railroad industry was "major" or "minor", nevertheless it has laid down the doctrinal distinction in *Elgin v. Burley*, 325 U. S. 711 (1945), holding that "minor" disputes must be relegated to the National Railroad Adjustment Board. Thus the lower courts here have failed to apply the *Elgin* doctrine to the instant facts. *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

Fundamentally the question and this conflict involves whether or not, after negotiating a new wage agreement, a carrier may unilaterally terminate the old agreement with-

out putting into effect the new one, thereby depriving railroad workers of the benefits of the old as well as the new agreement.

Circuit Judge Goodrich utterly failed to distinguish between "major" and "minor" disputes in the railroad industry when he said at page 33:

> "The plaintiffs, themselves, acknowledge that disputes between carriers and their employees as to interpretation of existing agreements must be referred to the National Railroad Adjustment Board. Plaintiffs argue that this litigation does not involve an interpretation of an existing agreement . . . If plaintiffs have any claim at all against the Railroad it must be because of existing 'agreements' between the Brotherhood and the Railroad; the allegation that the Brotherhood has permitted the Railroad to ignore the 'agreements' does not remove this case from the Board's jurisdiction."

Thus Judge Goodrich, affirming the lower court, found that *Slocum v. Delaware, L. & W. R. R.*, 339 U. S. 239 (1950), and *Order of Ry. Conductors v. Southern Ry.*, 339 U. S. 255 (1950), applied, and determined that this question of *collective bargaining* was for the National Railroad Adjustment Board.

If this decision is allowed to stand, it means that no railroad worker in this Circuit may seek judicial relief where a carrier, with the tacit consent of the statutory representative, abrogates an existing wage agreement and fails to replace it with another contract.

Both lower courts cited *Pennsylvania R. R. v. Day*, 360 U. S. 548 (1959) and *Union Pac. R. R. v. Price*, 360 U. S. 601 (1959) as applicable to the instant dispute. In doing so the courts took the view that *any* dispute must be heard by the National Railroad Adjustment Board. Actually the *Day* and *Price* cases (supra) stand for the narrow proposition that where the interpretation or application of an existing agreement is in question, irrespective of the status of

the employment relation, the problem must be resolved by the Board.

The lower courts, failing to apply the doctrine of the *Elgin* case (supra) treated this complaint as a suit for damages and injunctive relief involving the interpretation or application of an existing agreement.*

For this complete disregard of the doctrine of the *Elgin* case (supra) this Court should review the judgments of the courts below, for clearly these courts have placed a statutory construction on the instant dispute inconsonant with the intent of Congress and the decisions of this court.

3. The dispute presented here presents a pressing cause for review of the lower courts' decisions, since those courts hold that a complaint by a railroad worker against an employer *and* a statutory representative must be taken to a tribunal the membership of which is determined by the very parties whose actions are being protested. Section 153. First. (a) (b) and (c) of the Railway Labor Act provide for the method of selecting members of the National Railroad Adjustment Board. Both the Pennsylvania Railroad and the Brotherhood of Railway and Steamship Clerks have representatives on this tribunal, and the salaries of these representatives are paid by this carrier and this brotherhood. Moreover the respondents have established their own Regional Board in accordance with Section 153. Second. Requiring this class of Petitioners to present their complaint to these tribunals would be in direct conflict with the Due Process Clause of the Fifth Amendment to the federal constitution. This constitutional question has not been resolved by this Court.

However, this Court did say in the *Steele* case (supra) at page 206:

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* The courts had a clear understanding of the factual dispute as averred in the complaint. See Circuit Judge Goodrich's summary of the facts at page 33 of the appended opinion.

"We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy, CF. *Tumey v. Ohio*, 273 U. S. 510."

4. The lower courts' decisions must be reviewed for another cogent reason. This Court said in *Steele v. L. & N. R. Co.*, 323 U. S. 192, page 205:

"Section 3, First (i) which provides for reference to the Adjustment Board of 'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements' makes no reference to disputes between employees and their representatives. Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, *that Board could not give the entire relief here sought.*"

Obviously this Court in the *Steele* case refused to relegate the complainants to the National Railroad Adjustment Board because it could not afford complete relief, since there the complaint was against *both* a carrier and a brotherhood. Thus this Court construed the statute as providing relief before this tribunal only where a carrier is a defendant, and that this tribunal is unable to afford complete relief against a carrier *and* a brotherhood, and therefore there is no statutory authority for giving the National Railroad Adjustment Board jurisdiction over such a dispute.

If we apply this statutory construction to the instant case, it becomes all the more apparent why the decisions of the lower courts must be reviewed by this Court since they are glaringly in conflict with *Steele* (supra) and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, decided at the same term on the same issues.

5. The opinion of the Circuit Court is erroneous and should be reviewed by this Court for still another reason:

the court in affirming the lower court held that Petitioners should have exhausted internal union remedies or at least should have averred what remedies had been exhausted before applying for judicial relief against their union. Judge Goodrich cited the *Tunstall* case (supra) for this proposition. The *Tunstall* case, however, speaks of administrative remedies available under the Railway Labor Act, and makes no direct or indirect reference to internal union remedies.

Moreover, Petitioners averred in their complaint that this dispute had gone unheeded by all echelons of the Brotherhood since 1951. And in the proposed amended complaint which the lower court refused Petitioners leave to file, there were additional averments of the intra-union procedures Petitioners employed hoping to gain redress of this wrong, to no avail.

It is submitted that the lower courts have ignored the strong legislative policy laid down by Congress in the new Labor Management Reporting and Disclosure Act of 1959. Public Law 86-257, 86th Congress, S. 1555, September 14, 1959 (73 Stat. 519). Section 101 (a) (4) holds that a union member need not exhaust internal union procedures beyond a four month period before seeking judicial relief.

Petitioners averred in the Complaint below that their pleas for help addressed to the union went unheeded for ten years. The holdings of the courts below are obviously contrary to the new Congressional policy.

Even if the lower courts wanted to ignore the new act of Congress on the theory that it was inapplicable to a dispute which arose prior to its enactment, the decisions of those courts should be reviewed since they place an unwholesome advantage in the statutory representative and clearly conflict with the view of this court in the *Steele* case (supra) where this Court faced with a similar factual situation said (page 196):

> "Protests and appeals of petitioner and his fellow Negro firemen, addressed to the railroad and the

Brotherhood in an effort to secure relief and redress have been ignored."

The opinions of the lower courts fail to mention this new Congressional labor policy; they ignore the ten year period Petitioners waited before seeking judicial relief; they do not suggest how many more years Petitioners should plead with their statutory representative for relief. The opinions blithely hold that Petitioners have not exhausted internal union remedies and hence their complaint is premature.

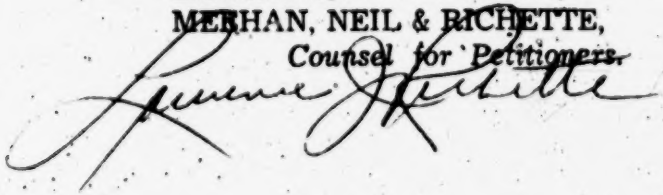
Thus, on the horns of a dilemma, the courts dismiss the complaint as to the union first by ignoring *Conley v. Gibson*, 355 U. S. 41 in which this court said that union members could seek judicial relief against their statutory representative when it violated its duty, and then to strengthen the dismissal of the complaint cite the *Tunstall* case for the proposition that union members must first exhaust internal union remedies before applying to the court for relief. For this misapplication of the doctrine of these cases, this Court should review the opinions of the courts below. Since Congress was silent on this problem in the Railway Labor Act —assuming that the new labor act is inapplicable—the decisions of the lower courts are ripe for review by this Court to determine whether or not the Railway Labor Act intended that an employee who is aggrieved by his union's acts of omission or commission must first exhaust intra-union remedies before seeking judicial relief; and in the instant case, whether ten years' waiting is sufficient.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

LAWRENCE J. RICHETTE,
MERHAN, NEIL & RICHETTE,
Counsel for Petitioners.



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A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Caption Omitted.)

OPINION AND ORDER SUR MOTIONS TO DISMISS.

LORD, J. August 31, 1959.

The two named plaintiffs are employees of the Pennsylvania Railroad who assert wage claims against the carrier, and claims for damages and refund of dues against the union. The named defendant union will hereafter be called *The Brotherhood;* the defendant carrier will be spoken of as *The Railroad;* and references to The Act will signify the Railway Labor Act, 45 U. S. C. A. Sec. 151 *et seq.*

Each defendant has moved to dismiss, raising a variety of defenses and objections to be discussed herein.

The complaint, consisting of 20 paragraphs, an exhibit, and an amendment, was filed by plaintiffs in the form of a class bill on behalf of themselves and other persons similarly situated to recover about $1,750,000 back wages from the Railroad, a like amount as penalty against the Brotherhood, and an indeterminate sum for refund of dues paid to the latter.

The bill alleges that the Brotherhood is the duly authorized bargaining agent of the clerical employees (including plaintiffs as "tallymen") of the Railroad, so certified under the Act. A bargaining agreement between the Brotherhood, representing the employees, and the Railroad was

executed in 1942, covering the entire Pennsylvania Railroad System.

Under the terms of this agreement, tallymen at freight stations in the Central Region of the Railroad were paid on a straight hourly basis, whereas tallymen in the Eastern Region were paid on a tonnage rate, depending on the amount of freight handled. As a result, the Eastern Region tallymen (plaintiffs) received less take home pay per month than the Central Region men.

In paragraphs I through VII, in which the foregoing facts appear, there are the following recitals, among others. The named plaintiffs are residents, respectively, of Camden, New Jersey, and Philadelphia, Pennsylvania. The Brotherhood does business in Pennsylvania, maintains an office in Philadelphia, and is there represented by an authorized agent.

In paragraph I this cause is said to be

> "a civil action arising under the Constitution and laws of the United States brought under the Railway Labor Act, 45 U. S. Code 151 et seq."

In paragraph V plaintiff says:

> "The jurisdiction and venue of this Court are established by precedents of the United States Supreme Court which hold that the (Federal) right not to be discriminated against is implied in the Railway Labor Act, 45 U. S. Code 152 et seq.)"

The alleged class on whose behalf the suit is brought are those who are or were since August 1, 1950, the employees classified as Group I workers, i.e. clerks—more specifically known as "tallymen" in the Eastern Region of the Pennsylvania Railroad system. In that area (Altoona east to New York, Philadelphia, and Washington, D. C.) the asserted monthly wage disadvantage by comparison to the Central Region employees, was approximately $25 per

month (and later, due to general wage increases, $30 per month). In addition, the Central employees received sick leave benefits not available to the Eastern group.

The crucial paragraph VIII reads:

> "This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S.V.W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. In substance the defendant railroad company agreed to pay 'tallymen' on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit 'A.'"

Recitals add that the Railroad later refused to effectuate the agreement, and that the Brotherhood failed to enforce it, or follow up the negotiations. An amendment states that the Railroad, moreover, in 1951 eliminated tonnage payments to the tallymen, in contravention of the Act as well as the 1942 collective bargaining agreement.

After reciting the enforcement machinery which was at the disposal of the Brotherhood under the Act, the fact that the Brotherhood at all times enjoyed the benefit of competent counsel is pointed out. The next allegation, XIII, must speak for itself:

"The only reason for failure of the Brotherhood to compel the Pennsylvania Railroad Company to abide by its agreement is that the Pennsylvania Railroad Company could control union officers at will. For all of the officers of the Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees were former officers of the Pennsylvania Railroad Company union which was disbanded by the carrier in 1937 when the Brotherhood obtained the collective bargaining rights for this craft on the Pennsylvania Railroad."

Paragraphs XIV and XV state that plaintiffs have no specific remedy under the Act, and

". . . no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Company has gone unheeded by all echelons of the Brotherhood since 1951."

After reciting the resultant economic hardship to plaintiffs, XVII says:

"Though the carrier has a constitutional right to discriminate against employees when it agrees to remove that discrimination as a part of a collective bargain it cannot then attempt to abrogate that agreement and renew the discrimination to the pecuniary detriment of employees."

Paragraph XVIII alleges the wrongful discrimination, asserts third party beneficiary rights of the plaintiffs in the alleged agreement; and claims the right of plaintiffs to enforce the agreement against the Railroad and "to sue the Brotherhood for breach of trust." Paragraph XIX specifies actions which the Brotherhood might have taken by way of enforcement of the alleged agreement and concludes with

the recital that the Brotherhood continues to ignore its duty.

Damages are asserted, as result of defendants' wrongful acts, on behalf of "a minimum of 600 persons on the Eastern Region" comprising the class, at $30 per month since 1950 —amounting to $1,734,000 exclusive of interest. In addition to general equitable relief, they demand:

> "1. Mandatory injunction compelling defendant Pennsylvania Railroad Company to equalize the pay scale [as described];
>
> "2. Damages against the Pennsylvania Railroad for losses in earnings for a minimum of $1,734,000.
>
> "3. Interest against the Pennsylvania Railroad Company at 6 per cent from August 1, 1951 to the date of judgment.
>
> "4. Punitive damages on item (2) supra against the defendant Brotherhood equal to the judgment assessed against the Pennsylvania Railroad Company for wanton breach of trust and violation of the duty owed to the plaintiffs as agents, and for violating their statutory duty.
>
> "5. An order compelling the defendant Brotherhood to return dues collected from plaintiffs for the period in question since defendant gave plaintiffs no quid pro quo for these union dues."

1. *Jurisdiction over the Person; Insufficiency of Service of Process.*

The Brotherhood protests that it is not doing business within the District of the United States District Court for the Eastern District of Pennsylvania, and is therefore not subject to the jurisdiction of the court.

It also asserts insufficiency of service of process for the

reason that service (at the Board of Adjustment office at 15th and Locust Streets in Philadelphia) was not made at an office at which the Brotherhood regularly conducts business or upon a representative authorized by the Brotherhood to accept service on its behalf. Defendant insists that the Brotherhood conducts no regular business from the office mentioned, that the Pennsylvania Railroad System Board of Adjustment, of which J. C. McGuigan is an officer, is autonomous and independent of the Brotherhood, and that the Brotherhood has therefore not been served. *Farnsworth & Chambers Co., Inc. v. Sheetmetal Workers*, 125 F. Supp. 830 (D. N. Mex. 1954); *Isbrandtsen Co., Inc. v. National Marine Engineers;* 9 F. R. D. 541 (S. D. N. Y. 1949).

The affidavits in the present motion present virtually the same facts that were before Judge Sporkin in 1957. *McGovern, et al. v. Brotherhood of Railway Clerks*, Court of Common Pleas No. 2, Philadelphia County, September Term 1956, No. 3908 in Equity. After full consideration it was held that

> "... Service upon the local lodge was sufficient service upon the Brotherhood, Spica v. I.L.G.W.U., 388 Pa. 382 (1957), 130 A. (2d) 468 (1957); Tunstall v. Brotherhood of Locomotive F. & E., 148 F. 2d 403 (4th Cir. 1956); Operative Plasterers' and Cement Finishers' Association v. Case, 93 F. 2d 56 (D. C. Cir 1937), as was service upon McGuigan, who, as Assistant vice-General Chairman of the System Board constituted such an official for service of process as was contemplated by Pa. R.C.P. 2157. See Spica v. I.L.G.W.U., *supra;* Quinn v. Pershing, 367 Pa. 426 (1951); Underwood v. Maloney, 14 F. R. D. 222 (E. D. Pa. 1953); Claycroft v. United Mine Workers of America, 204 F. 2d 600 (6th Cir. 1953)."

This Court takes the same view of the service of process, and the interrelation of the System Board and the Brotherhood, and rules that jurisdiction of the person of the defendant Brotherhood was properly obtained.

2. *Is the Matter Res Adjudicata as to the Brotherhood?*

The Brotherhood claims that the matter presented by the Complaint is

> "res adjudicata, as to the Defendant Brotherhood, the matter having been fully litigated by the Court of Common Pleas No. 1 of Philadelphia County, December Term, 1953, No. 6298, affirmed on appeal by the Supreme Court of Pennsylvania at 348 Pa. 242 (1956) and certiorari denied by the Supreme Court of the United States wherein the claims respecting the questions raised in this case were dismissed."

That controversy began when a new Philadelphia freight station, known as the Butler Street Station, was opened in 1953. *Grand Lodge, B. of R. & SS C. v. Girard L.*, 384 Pa. 284 (1956). Freight business theretofore handled at several stations of the Pennsylvania and other lines was diverted to Butler, with a resultant reduction of the number of available jobs.

Dissatisfaction as to the reallocation of work caused certain lodges of the Brotherhood to refuse to pay their per capita taxes to the Grand Lodge within the time prescribed by the latter's constitution and by laws. The Grand Lodge brought suit for forfeiture of the charters of those locals. The Supreme Court held that the lower court had erred in refusing to enforce the forfeiture, since it was expressly provided for by the contractual undertaking of the parties. *id.* 384 Pa. 248, 268.

The opinion and record in that cause enable one to appreciate the undercurrents present in the instant acrimonious dispute. The questions there involved differ from those at hand, however, and the decision is deemed not res adjudicata for present purposes.

3. *Laches and Statutes of Limitations.*

Both defendants point out that the plaintiffs allege that an agreement was reached in 1950 but did not file their complaint until 1959. They cite the Pennsylvania 6 year statute of limitations (Act of March 27, 1713, 1 Sm. L. 76, 12 P. S. 31) as applicable at least by analogy, and Pennsylvania decisions. *e.g. Madera v. Monongahela Railway Co.*, 356 Pa. 460 (1947).

The collective bargaining agreement, furthermore, provides limits of from 60 to 90 days on the submissions of claims. Railroad's Exhibit 1, Rule 7-B-1. They collect cases to the effect that time limits in contracts, including collective bargaining agreements, have frequently been enforced as reductions of the statutory period for bringing contract actions. *Povey v. The Midvale Company*, 175 Pa. Superior Ct. 395 (1954), *cert. den.* 348 U. S. 875 (1954).

It is recognized that these defenses would prove formidable were the complaint otherwise supportable. In view of the allegations of discrimination and fraud, however, and assertions of the right to injunctive relief against continuing breaches of contract and of trust, this Court is not inclined to make summary disposition of the complaint on that short ground.

4. *Jurisdictional Amount Involved; Lack of Diversity of Citizenship; Not a Proper Class Action.*

These several jurisdictional objections, presented by defendants in different aspects, are based on the proposition that plaintiffs have failed to establish federal-question jurisdiction. Lacking such basis, there is not the diversity of citizenship required under 28 U. S. C. A. Section 1332, since the complaint recites that one plaintiff resides in Pennsylvania, as does the defendant Railroad. This Court

agrees that a federal question would be required in order to confer jurisdiction.

So far as it goes, the next proposition is doubtless correct. Defendants say that the fact that plaintiffs purport to bring a class action for a total of close to two million dollars is immaterial because separate and distinct demands cannot be aggregated to make up the jurisdictional amount. *Hughes v. Encyclopedia Brittanica*, 199 F. 2d 295 (7th Cir. 1952). The argument, however, goes only to the monetary claims, and disregards the claims for injunctive relief. Dismissal, therefore, cannot be granted on that score

The third point is that this is not a proper class action. In the absence of a federal question, it is said to be a contract action, of the type known as the spurious class action. In such, plaintiffs represent only themselves and others who actually intervene. *Knudsen v. Chicago and Northwestern Railway Co.*, 106 F. Supp. 48 (N. D. Ill. 1952); 3 Moore's Federal Practice, Par. 23.10 (2d ed., 1948).

Were the complaint otherwise good, this point would deserve serious consideration. As will be seen, the regulations of the Brotherhood are properly before the Court on these motions. The Constitution and the Obligation of this union prohibit any resort to judicial proceeding until after exhaustion of internal remedies. Sec. 2(b), Article 5, Const. The Obligation, appearing at page 13 of the Ritual, provides (at pages 14-15)

> "I further promise and declare that I will not under any circumstances resort to or bring suit in any court or courts either Federal, State or Provincial until after I have exhausted all my rights and used all means at my command within and under the laws of the Brotherhood.
>
> "I further declare that should I from any cause leave this Order my obligation shall remain binding and in full force."

It would be speculative, indeed, to resolve these motions on the assumptions which would be necessary in order to

make decisive the objections here discussed. On the other hand, it seems a strong assumption for any court to conclude that the present action automatically joins the 600 members, more or less, of the alleged class in seeming disregard of the undertakings of membership.

To reach the heart of the present matter, however, it seems necessary to determine whether or not this complaint shows that an agreement was ever made.

5. *Was the Alleged Agreement Ever Reached?*

The complaint alleges that an agreement was reached on August 1, 1951. Elsewhere, however, it seems to say that the Brotherhood should have entered into an agreement, and breached its duty in that respect. (Complaint, Par. VIII and cf. XVIII and XIX). Paragraph VIII speaks of an agreement as "consummated" on August 1, 1951, and confirmed by letter which was attached as Exhibit "A."

That Exhibit, reproduced verbatim, reads as follows:

Plaintiff's EXHIBIT "A"

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary Treasurer

G. R. Kershaw
Senior Vice General Chairman
G. M. Hill
Vice General Chairman
M. C. Renkenberger
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD
OF ADJUSTMENT
1214-16 Clark Bldg., 717 Libert Ave.,
Pittsburgh 22, Pa.
File 4.114 Eastern Region
Subject: Piecework on Tonnage
Rates of Pay —
Philadelphia Transfer

April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Division
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

"We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location.

"In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are

agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

"Will you please advise if you concur.

Yours truly,

/s/ S. V. W. Loehr
General Chairman

"Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S.V.W.L.

"Above letter found at X 162-163 of original-record C. P. #1, Dec. Term 1953, No. 6298."

One recalls that the Complaint (Par. VIII) recites that

". . . on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations and Transfer on behalf of the Pennsylvania Railroad . . . ."

whereby Eastern Division tallymen were to get pay and fringe benefits equalling those prevailing on the Central Region.

". . . The understanding between the Brotherhood and the carrier was reduced to writing as was the cus-

tom in like matters by a letter . . . confirming . . . attached hereto and marked Exhibit 'A.'"

The "confirming" letter clearly shows a date of April 21, 1950. How a letter of that date could confirm an agreement of August 1, 1951 is not explained. To the contrary, plaintiffs' brief in reply to the Railroad's Motion seems to concede that there was no agreement.

Plaintiffs therein quote at length from a case cited by the Railroad, *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950) at pages 242-243. They then say:

> "Thus, we can see that under this decision the Adjustment Board has jurisdiction to settle a dispute which involves the interpretation or application of an *existing agreement*, or disputes involving *the making* of collective agreements.
>
> "Do we have an *existing* agreement within the meaning of the *Slocum Case*, supra? Obviously not. The carrier and the Brotherhood are still operating under the old agreement, the terms of which were illegally changed. The terms of the new agreement are only partially in force. We are between two agreements!"

No unfairness to plaintiffs is intended by excerpting from context the statement that "we are between two agreements." It does seem reasonable to conclude, however, that if the complaint discloses a "new" agreement, it is simply an amendment of the old one.

However that may be, the complaint must govern here, and the exhibit pleaded as stating the agreement must control. And that letter, Exhibit "A", inescapably reveals itself as a mere offer or, possibly, a counter offer.

Insofar as the exhibited letter purports to quote in turn from a letter written by the Railroad on April 7, 1950, no support for the agreement theory appears. In the first place, the quotation does not bind the Railroad, even if one assume from the pleadings that there was no disclaimer by

the addressee. *A. B. Leach & Co. v. Peirson*, 275 U. S. 120, 48 S. Ct. 57 (1927). Furthermore, it simply expresses favor toward elimination of tonnage rates.

The letter itself, which is designated as a "confirmation," connotes an offer or counteroffer in its next to last paragraph by the passage commencing "This is based on our understanding . . ." At least, lack of prior oral agreement as to terms is implicit in the sentence "We suggest that this entire arrangement be made effective as of May 1, 1950."

The final sentence, which clearly asks whether the offer is acceptable, is deemed controlling as to the absence of prior agreement, *i.e.* "Will you please advise if you concur."

It seems patent that the requirements for the formation of an informal, bilateral contract were not met by the showing made on the complaint and exhibit, and it is so ruled. *Restatement of Contracts*, Secs. 19 and 22. The letter is found to fit the definition of an offer—a manifestation of intent. *Restatement of Contracts*, Sec. 24; cf. *Cohen v. Johnson*, 91 F. Supp. 231 (M. D. Pa. 1950).

6. *Jurisdiction over the Subject Matter; Failure to State a Claim for which Relief Can be Granted.*

In the light of the foregoing ruling, it seems appropriate to discuss these major objections simultaneously.

A. *Remedies under the Railway Labor Act Are Exclusive.*

Plaintiffs claimed jurisdiction here under the Act (45 U. S. C. A. 151 *et seq.*). Agreement or no, however, the United States Supreme Court in recent decisions has gone to some pains to make clear that the remedies under the Act are exclusive. *Pennsylvania R. Co. v. Day*, 360 U. S. 548 (1959); *Union Pacific R. Co. v. Price*, 360 U. S. 601 (1959).

It seems entirely clear in the cases that the Act itself is designed to settle disputes or grievances arising "out of the interpretation or application of agreements concerning rates of pay." 45 U. S. Code Sec. 153(i). Cases to the effect that "the jurisdiction of the Board to adjust grievances and disputes of the type covered by the Act is exclusive" are collected in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 161 F. Supp. 295, 297 (S. D. Calif. 1958). Thus, even had there been an agreement as to pay equalization, it does not follow that this court would have had jurisdiction.

Lurking in plaintiffs' complaint is an alternate suggestion that the Brotherhood should have entered into an agreement, and breached its duty in that respect. (Cf. Complaint, paragraphs XVIII and XIX). The procedures suggested by paragraph XI—whether to enforce or to negotiate an agreement—are not matters to be policed by a federal Court. That is, it is not for this Court to compel mediations under Sec. 5(first)(a)(b) of the Act (45 U. S. C. A. §155); to instigate recourse to a presidential fact-finding board; and much less to find fault with the Brotherhood for failing to seek a strike ballot (Cf. par. XI).

To the extent that collusion between the Brotherhood and Railroad is suggested (e.g. par. XIII), the result is the same. Plaintiffs bottom their cause on the existence of the collective bargaining agreement of May 1, 1942 (Par. VI), and seem to be in the position of the plaintiffs in *Bennett, et al. v. Progress Lodge 992, Brotherhood of Railway and Steamship Clerks, Etc. and The B. and M. Railroad*, 159 F. Supp. 93 (D. Mass. 1958).

In that case the complaint based jurisdiction on the Act (*inter alia*) and alleged that the plaintiffs were wrongfully discharged or denied employment and, as a result of collusion between the Brotherhood and Railroad, were denied a hearing before either. A motion to dismiss for lack of jurisdiction over the subject matter was granted for the reason that:

"All the claims advanced by these plaintiffs . . . involve a reading of the collective bargaining agreement and consequently are within the sole jurisdiction of the Railroad Adjustment Board."

B. *Allegations of Fraud and Collusion.*

Since the case last mentioned raised that very issue, it is appropriate here to mention that in addition to the averments of the complaint, the plaintiffs' briefs are replete with charges that go far out beyond those found in the complaint. On these motions, however, all that may be considered are the complaint, exhibit, and amendment, plus affidavits and exhibits as to matters inherent in the averments properly stated in the complaint. *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465, 469 (M. D. Pa. 1959).

Facts well pleaded in the complaint are assumed to be true. *Creswell-Keith, Inc. v. Willingham*, 264 F. 2d 76 (8th Cir. 1959). It is fully recognized that dismissals without a hearing on the merits are not favored. *Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co.*, 61 F. Supp. 62 (N. D. Calif. 1945). Acts of fraud not particularized in the complaint, however, cannot be considered. *Carrigan v. California State Legislature*, 263 F. 2d 560 (9th Cir. 1959), *cert. den.* 359 U. S. 980, 79 S. Ct. 961.

C. *Discrimination as Basis of Federal Jurisdiction.*

It is plaintiffs' position that the alleged discrimination gives a basis for direct recourse to the federal court. In that connection, it is necessary to examine some of the so-called *discrimination cases*. A leading case, which reviews the authorities, is *Conley v. Gibson*, 355 U. S. 41 (1957). Plaintiffs there had alleged that the railroad had purported

to abolish 45 jobs held by the petitioners and other negroes and fill the jobs with whites. They alleged the failure of their union, the designated bargaining agent, to represent them without discrimination in protection of their employment and seniority rights under the contract between the union and the railroad. Holding that it was error for the court below to dismiss for want of jurisdiction, the Supreme Court said at the outset (page 42):

> "Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with Steele v. Louisville & Nashville R. Co., 323 U. S. 192, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination [collecting cases]."

Those discrimination cases invariably involve racial discrimination, and are deemed not in point in the instant case. An exception, not heretofore cited, is *Mount v. Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604 (6th Cir. 1955). There the plaintiffs were held entitled to a hearing on the merits upon their showing that the labor union had given notice that it was on the point of negotiating with the railroad an amedment to the collective agreement in direct defiance of the repeated adjudications of union tribunals at various appellate levels.

The discrimination cases seem to be of two classes: a larger group which concerns racial discrimination—then a much smaller category comprising instances of arbitrary and capricious action within a union, in defiance of that union's own internal procedures. An overt, hostile and invidious discrimination must be demonstrated in order to raise such ground. None of those cases gives color to the

assertion that there is a federal question presented by the instant complaint. For that matter, paragraph XVII of the complaint itself concedes that in the absence of the purported agreement of 1951 the Railroad is legally entitled to maintain a differing wage rate for tallymen in different geographic locations.

D. *Allegations of Facts Themselves Inconsistent with Facts Essential to Recovery.*

Before consideration of other grounds of objection, the hornbook rule is recognized that a complaint must be dismissed where it contains admissions or allegations which themselves are inconsistent with facts essential to recovery. This salutary rule is designed to prevent the courts and litigants from being subjected to the inconvenience and expense of patently defective actions. It may well be applied to the present complaint in a number of instances.

As an example, one sees that the complaint states an agreement, and yet the supporting exhibit shows itself, by its date as well as its own language, to be an offer or attempt at negotiation.

The complaint bases jurisdiction in this court on the Act, yet tacitly confesses that it seeks to avoid or bypass that Act by allegations of discrimination.

Further inconsistencies have been seen and will appear. Suffice it to say that the objections of defendants on this score are upheld.

E. *Failure to Show Exhaustion of Administrative or Contractual Remedies.*

It has been ruled above that the remedies under the Act are exclusive, and that plaintiffs clearly have not followed them, and that compliance with such procedures are prerequisite. 45 U. S. C. A. Sec. 153, First(i); *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950).

Apart from the Act, however, there is the procedure of the collective bargaining agreement and the internal procedure of the Brotherhood. That agreement and those regulations are before this court. The complaint has stated the existence of the collective bargaining agreement, and named the Brotherhood as the duly authorized bargaining agent for these plaintiffs. The defendant Brotherhood therefore quite properly incorporated in its motion the Constitution of the Grand Lodge and the By-Laws of the Pennsylvania Railroad System Board of Adjustment of the Brotherhood. *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465 (M. D. Pa. 1959). Those exhibits disclose a system of remedies for redressing any wrong which a member may suffer.

The rights and duties of that constitution and by-laws have been held to be fair and in compliance with fundamental justice and due process in three recent cases decided in Pennsylvania. *Grand Lodge of the Brotherhood v. Girard Lodge*, 384 Pa. 248 (1956); *McGovern v. Brotherhood of Railway Clerks*, Court of Common Pleas No. 2, Philadelphia County, September Term, 1956, No. 3908; *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465, 469 (M. D. Pa. 1959).

It is true that plaintiffs allege that they

> "... have no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Company has gone unheeded by all echelons of the Brotherhood since 1951."

That statement (Par. XV), otherwise unsupported, gives no indication that the internal procedure has been followed. Since that procedure has recently been analyzed in the opinion of Judge Follmer in the *Fagan* case, heretofore cited, to go over the entire ground seems unnecessary. See *Fagan v. Pennsylvania Railroad Company*, 173 F. Supp. 465 (M. D. Pa. 1959). It is patent that plaintiffs have failed to exhaust their administrative remedies within the Broth-

erhood and under their collective bargaining agreement, which is prerequisite to judicial relief. *Trainer v. International Alliance of T.S.E.*, 353 Pa. 487, 46 A. 2d 463 (1946); *cf. Underwood v. Maloney*, 152 F. Supp. 648, 658 (E. D. Pa. 1957). Thus, quite apart from jurisdiction under the Act, the plaintiffs have failed to make a proper showing to entitle them to relief.

For the foregoing reasons the motions to dismiss made by the defendant Brotherhood and the defendant Railroad are in each case granted and it is accordingly ORDERED that the complaint in this cause filed by JAMES A. GAINEY and J. L. YOUNG, et al. be and the same is hereby DISMISSED.

s/ JOHN W. LORD, JR.,
J.

B.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

(Caption Omitted.)

OPINION OF THE COURT.

(Filed February 24, 1960.)

By GOODRICH, *Circuit Judge*.

This is an appeal from the granting of motions to dismiss the complaint, 177 F. Supp. 421 (E. D. Pa. 1959). The plaintiffs, purporting to represent themselves and a mini-

mum of six hundred other employees similarly situated, sued Pennsylvania Railroad Company (Railroad) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Brotherhood) declaring that the action was brought under the Railway Labor Act, 45 U. S. C. A. §151 and following. The plaintiffs seek a mandatory injunction to compel the Railroad to equalize wages paid to "tallymen" in its eastern and central regions, damages for loss of earnings, punitive damages against the Brotherhood and a return of dues collected by the Brotherhood from the plaintiffs during the period in question.

The material allegations of the complaint may be summarized as follows: Plaintiffs are "tallymen" employed by the Railroad in its eastern region and are members of the Brotherhood; as such, they are covered by a collective bargaining agreement entered into between the Railroad and the Brotherhood on May 1, 1942. At all relevant times, they say, eastern region "tallymen" were paid approximately $25 per month less than their central region counterparts. This geographic differential in pay was the subject of a dispute. It is claimed that an "agreement" (reduced to writing in a letter attached to the complaint) was entered into in 1950 removing the differential. The letter also provided for the elimination of certain tonnage rates (the exact nature of which is not made clear by the complaint) in the eastern region. Despite this "agreement," it is alleged, the pay rates were never equalized, although tonnage payments to the eastern region "tallymen" were eliminated. The Brotherhood, it is charged, has never taken any steps to compel the Railroad to abide by its new "agreement" because "the Pennsylvania Railroad Company could control union officers at will." Accordingly, plaintiffs bring this action.

A seemingly insurmountable defense of the Railroad to this suit is Section 3, First (i) of the Railway Labor Act, 45 U. S. C. A. §153, First (i). This section provides for the referring of unresolved disputes "between an employee or

group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," to the appropriate division of the National Railroad Adjustment Board. Beginning with *Slocum v. Delaware L. & W. R. R.*, 339 U. S. 239, 244 (1950) and *Order of Ry. Conductors v. Southern Ry.*, 339 U. S. 255 (1950), the Supreme Court has held that primary jurisdiction in such cases as these lies in the Board and not in the courts, state or federal. See *Pennsylvania R. R. v. Day*, 360 U. S. 548 (1959), and *Union Pac. R. R. v. Price*, 360 U. S. 601 (1959), for the most recent reiterations and applications of this rule. The plaintiffs, themselves, acknowledge that "disputes between carriers and their employees as to interpretation of existing agreements must be referred to the National Railroad Adjustment Board." Plaintiffs argue that this litigation does not involve an interpretation of an existing agreement. In spite of the many words used in arguing this point, we think it has no merit. If plaintiffs have any claim at all against the Railroad it must be because of existing "agreements" between the Brotherhood and the Railroad; the allegation that the Brotherhood has permitted the Railroad to ignore the "agreements" does not remove this case from the Board's jurisdiction. This point alone would be sufficient to require dismissal of the complaint against the Railroad.

There is an additional reason why plaintiffs' basic claim against the Railroad must fall. That cause of action is based solely on a contract. According to the complaint,[1] that contract is embodied in a letter written by the General

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[1] Paragraph VIII of the complaint reads as follows:

"This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S. V. W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on Au

Chairman of the Brotherhood's Pennsylvania Railroad System Board of Adjustments to W. L. Nancarrow, General Manager of the Railroad's eastern region, under date of April 21, 1950. This letter is attached to the complaint and its authenticity is not denied by the defendants. The letter must be quoted in full because this is the peg upon which the plaintiffs hang their case. It says:

"Dear Sir:

"This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

"We quote from your letter:

"'We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location.'

"In accordance with our discussion at our meeting

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gust 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. 'In substance the defendant railroad company agreed to pay 'tallymen' on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit 'A'."

in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate fo pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

"Will you please advise if you concur.

"Yours truly,

"s/ S. V. W. Loehr

"General Chairman

We think no amount of discovery, deposition or other procedural device can make this letter into a contract. The district judge described it as "a mere offer or, possibly, a counter offer," 177 F. Supp. at 428. We are sure it is no more than that and would be inclined to say it is simply an invitation for further comment from the Railroad official to whom it is addressed. It is perfectly clear that an interpretation of a writing is for the court. An examination of this writing reveals plainly that it is not an acceptance under general principles of contract law or under the decisions of Pennsylvania courts[3] in which state this letter was composed, mailed and received. We reiterate that no amount of discovery can turn a letter which on its face is not a contract into one.

If the plaintiffs claim that the provisions of the earlier agreement have not been lived up to, they may make their

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[2] See Restatement, Contracts §§2, 19, 20, 22, 24, 60 (1932).

[3] Cohn v. Penn Beverage Co., 313 Pa. 349, 169 Atl. 768 (1934); Selig v. Philadelphia Title Ins. Co., 380 Pa. 264, 111 A.2d 147 (1955); United Air

claims to the Railroad Adjustment Board, assuming that the claims would still be timely. Individual claimants may present such claims to the board.[4]

Whether or not plaintiffs' allegations against the Brotherhood are sufficient to state a cause of action under the Railway Labor Act and the line of cases stemming from *Steele v. Louisville & N. R. R.*, 323 U. S. 192 (1944), we need not decide here. The reason is that the plaintiffs have failed to allege exhaustion of their remedies within the union or an adequate reason for failure to do so. They say that their complaint "has gone unheeded by all echelons of the Brotherhood since 1951," but nowhere is there an allegation that they have attempted to pursue remedies available to them within the Brotherhood's internal structure. Recent Pennsylvania decisions[5] show us that this Brotherhood does indeed provide internal remedies which appear adequate. In a case such as this, exhaustion of internal union remedies (absent an adequate reason for failure to do so) is a prerequisite to suit. Both Pennsyl-

cantile Agencies, Inc. v. Slotsky, 121 Pa. Super. 1, 182 Atl. 788 (1936); Alexanian v. Fidelity Philadelphia Trust Co., 152 Pa. Super. 23, 30 A. 2d 651 (1943).

[4] See the plain language of 45 U. S. C. A. §153, First (i) ("disputes between an employee or group of employees and a carrier") and (j) ("Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect . . ."). See also Conley v. Gibson, 355 U. S. 41, 47 (1957) and Colbert v. Brotherhood of R. R. Trainmen, 206 F. 2d 9, 12 (9th Cir. 1953), cert. denied 346 U. S. 931 (1954). Cf. Steele v. Louisville & N. R. R., 323 U. S. 192, 205-06 (1944).

[5] Grand Lodge v. Girard Lodge No. 100, 384 Pa. 248, 120 A. 2d 523, cert. denied 351 U. S. 985 (1956); McGovern v. Brotherhood of Ry. and Steamship Clerks, September Term 1956, No. 3908 in Equity, Ct. Common Pleas No. 2, Philadelphia County, May 23, 1957. See also Fagan v. Pennsylvania R. R., 173 F. Supp. 465, 474 (M. D. Pa. 1959).

vania [6] and Federal[7] authorities support this conclusion.

Without going into all the other bases of defense brought before both the district court and this Court, we think it abundantly clear that the judgment of the district court was correct and the decision will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

C.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Caption Omitted.)

Present: GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

Upon consideration of the petition filed by plaintiffs-appellants March 7, 1960, and of the answer thereto by The

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[6] In a recent case, Fagan v. Pennsylvania R. R., 173 F. Supp. 465, 473-74 (M. D. Pa. 1959), Judge Follmer gives this trenchant statement of the legal proposition: "The law in Pennsylvania is well established that members of a labor organization may not seek relief in the courts against their union until they have exhausted all remedies available to them within the union to satisfy their grievances." The statement of the learned judge is fully borne out by the Pennsylvania decisions. See Durso v. Philadelphia Musical Soc'y, Local No. 77, 11 Pa. D. & C. 2d 463, 467 (1957), aff'd per curiam 392 Pa. 30, 139 A. 2d 555, 557-58 (1958); Binkowski v. Highway Truck Drivers and Helpers, Local 107, 8 Pa. D. & C. 2d 254, 255, aff'd per curiam 389 Pa. 116, 132 A. 2d 281, 283 (1957); Grand Lodge v. Girard Lodge No. 100, 384 Pa. 248, 262, 120 A. 2d 523, 530, cert. denied 351 U. S. 985 (1956).

[7] See Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210, 213-14 (1944).

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

It is ORDERED that the appellants' petition for clarification of judgment, directing the district court to allow plaintiffs to amend their complaint, be and it is hereby denied;

It is Further ORDERED that the petition for rehearing be and it hereby is denied.

By the Court,

GOODRICH,
Circuit Judge.

Dated: March 23, 1960.

D.

RAILWAY LABOR ACT (45 U. S. C. A. 151 ET SEQ.).

(1) Section 152 Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

(2) Section 153 First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided —

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or

through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve: but no labor organization shall have more than one representative on any division of the Board.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle

such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(3) Section 153 Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, c. 347, § 3, 44 Stat. 578; June 21, 1934, c. 691, § 3, 48 Stat. 1189.

(4) Section 155 First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(5) Section 156. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and

said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

E.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 1959 (29 U. S. C. A. 401).

29 §411 (a) (4). Protection of the right to sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

F.

FIFTH AMENDMENT TO THE U. S. CONSTITUTION.

". . . nor be deprived of life, liberty or property without due process of law . . ."

G.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Caption Omitted.)

COMPLAINT.

Come now the plaintiffs, James A. Gainey, 1016 Sheridan Street, Camden, New Jersey and J. L. Young, 1237 North 53rd Street, Philadelphia, Pennsylvania, individually and on behalf of those similarly situated and complain against the defendants as follows:

I.

This is a civil action arising under the constitution and laws of the United States brought under the Railway Labor Act, 45 U. S. Code 151 et seq.

II.

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (herein-

after referred to as the Brotherhood) is a voluntary unincorporated association, a standard railway labor organization, the representative, for all of the purposes of the Railway Labor Act, of the craft or class of clerical, office, station and storehouse employees including the plaintiff employees and others similarly situated on the Pennsylvania Railroad Company.

III.

The members of the Brotherhood and the employees of the defendant railroad company in the craft or class of clerical, office, station or storehouse employees represented by the said Brotherhood are so numerous and their exact number so large as to make it practically impossible to make them all parties by name, and it is impracticable to bring all of them before the Court by name; the said persons constitute a general class of persons, with a common interest in the subject matter of this suit and their interests are fairly represented by the named plaintiffs who sue in their own right and on behalf of all of those similarly situated. The named plaintiffs are residents of Camden, New Jersey and Philadelphia, Pennsylvania, one within the district of the United States District Court, for the Eastern District of Pennsylvania, the other in New Jersey.

IV.

The Brotherhood defendant maintains an office at the Lewis Tower Building, 15th and Locust Streets, Philadelphia, Pennsylvania and is represented there by J. C. McGuigan, an officer of The Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and is thus doing business in Philadelphia, Penn-

sylvania and within the district of the United States District Court for the Eastern District of Pennsylvania. Defendant, The Pennsylvania Railroad Company, maintains an office at 30th Street Station, Philadelphia, Pennsylvania, and is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and is engaged in the business of a common carrier by railroad and operates through the district of the United States District Court for the Eastern District of Pennsylvania, and is subject to the provisions of the Railway Labor Act, as is the defendant Brotherhood.

V.

The jurisdiction and venue of this Court are established by precedents of the United States Supreme Court which hold that the (Federal) right not to be discriminated against is implied in the Railway Labor Act. (45 U. S. Code 152 et seq.)

VI.

All the plaintiffs and those similarly situated for whom this suit is brought are or were at certain periods since August 1, 1950 employees classified as Group I workers, i. e., clerks, and more specifically, "tallymen", said employees were and are members of the defendant Brotherhood and are covered by a collective bargaining agreement entered into by the defendant Brotherhood and the defendant, The Pennsylvania Railroad Company, on May 1, 1942.

VII.

At all times prior to and since August 1, 1950, "tallymen" on the Pennsylvania Railroad Company were and are paid

by arbitrary geographic demarcations, i. e., employees in this classification working in the so-called Eastern Region (Altoona East to New York, Philadelphia, and Washington, D. C.) were paid $1.44 per hour based on 169½ hours per month, while employees in the so-called Central Region (West of Altoona to Fort Wayne, Indiana) were paid $269.17 per month. Thus for the same type of work an employee in Pittsburgh (Central Region) received $24.09 more per month than his counterpart in Philadelphia, or New York (the Eastern Region). Moreover, salaried employees received paid sick leave, ranging from one to three weeks depending on service, to which hourly employees are not entitled. These salary differentials persist to the present time although there have been since 1950 several salary increases for both regions.

VIII.

This arbitrary differential, based on geography alone, was the subject of a dispute between the plaintiffs and the defendant railroad company and finally, S. V. W. Loehr, General Chairman of the Pennsylvania Railroad System Board of Adjustment of the defendant Brotherhood proceeded to negotiate a settlement of the dispute—in accordance with the grievance processing machinery of the Railway Labor Act—and on August 1, 1951 an agreement was consummated by Mr. Loehr on behalf of the plaintiffs and Mr. Stewart, Superintendent of Stations & Transfer on behalf of the Pennsylvania Railroad Company. In substance the defendant railroad company agreed to pay "tallymen" on the Eastern Region the same monthly rate of pay then prevailing on the Central Region. Fringe benefits were likewise equalized between the two regions. This understanding between the Brotherhood and the carrier was reduced to writing as was the custom in like matters by a letter from Mr. Loehr to the Pennsylvania Railroad Company confirming the change in rate of pay. This letter is attached hereto and marked Exhibit "A".

IX.

The Pennsylvania Railroad Company, however, later refused to effectuate the agreement to equalize the pay rate between the Eastern and Central Regions and to this day has failed to abide by the agreement.

X.

The defendant Brotherhood despite the agreement which they consummated on behalf of the plaintiffs, as aforesaid, nevertheless failed to take any of the procedural steps as provided by the Railway Labor Act to solve the impasse. Moreover, when the Railroad closed its file on this agreement, the Brotherhood did likewise. To this day the Brotherhood has failed to use any legal or economic machinery to compel the Pennsylvania Railroad Company to effectuate this agreement.

XI.

The Brotherhood had at its disposal Sec. 5 (First) (a) (b) of the Railway Labor Act which provides for mediation. It failed to seek a presidential-fact-finding board. It failed to seek a strike ballot among the members of this craft to enforce the agreement.

XII.

The apathy demonstrated by the defendant Brotherhood is not founded in inability to cope with management, or ignorance, or failure of proper legal counseling. On the contrary, competent attorneys represent the Brotherhood of

Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. In Philadelphia Saul, Ewing, Remick and Saul are local counsel, while former Judge Robert S. Marx and Nichols, Wood, Marx & Gitner of Cincinnati are general counsel for the Brotherhood.

XIII.

The only reason for failure of the Brotherhood to compel the Pennsylvania Railroad Company to abide by its agreement is that the Pennsylvania Railroad Company could control union officers at will. For all of the officers of the Pennsylvania Railroad System Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees were former officers of the Pennsylvania Railroad Company union which was disbanded by the carrier in 1937 when the Brotherhood obtained the collective bargaining rights for this craft on the Pennsylvania Railroad.

XIV.

The plaintiffs have no specific remedy under the Railway Labor Act to compel the defendant railroad company to abide by the aforesaid agreement since mediation can only be invoked by a carrier or a Brotherhood. And since this is not a matter involving interpretation of an agreement, the machinery of the National Railroad Adjustment Board is unavailable to the plaintiffs. (Sec. 3 First (i) Railway Labor Act.)

XV.

The plaintiffs have no remedy within the Brotherhood since this complaint against the Pennsylvania Railroad Com-

pany has gone unheeded by all echelons of the Brotherhood since 1951.

XVI.

The failure of the defendants, the Brotherhood and the Pennsylvania Railroad Company, to effectuate this equalization of pay agreement as aforesaid has worked an economic hardship on the plaintiffs and other members of the class in that they receive less money than like Pennsylvania Railroad employees for the same work.

XVII.

Though the carrier has a constitutional right to discriminate against employees when it agrees to remove that discrimination as part of a collective bargain it cannot then attempt to abrogate that agreement and renew the discrimination to the pecuniary detriment of employees.

XVIII.

A collective bargaining representative may *not* discriminate against a class of employees for whom it has the bargaining right and especially when it discovers a discrimination against a group by a carrier it owes the duty to that class of eliminating that arbitrary classification and it owes a further duty of implementation by continual watching and policing to see that the carrier is abiding by the agreement to avoid discrimination. Moreover, third party beneficiary rights ripened on behalf of plaintiffs when these defendants consummated the aforesaid agreement. As such, plaintiffs have the right to enforce that agreement against the Pennsylvania Railroad defendant and to sue the Brotherhood for breach of trust.

XIX.

The Brotherhood violated the duty it owed to the plaintiffs in that —

1. When it entered into the agreement to equalize pay between the Eastern and Central Regions, it should have demanded immediate performance on the part of the carrier.

2. If it had been alert, upon the carrier's failure to abide by the agreement, it should have at least sought mediation service provided by the Railway Labor Act.

3. Or it could have brought suit against the carrier for breach of contract by way of a mandatory injunction and damages.

4. The Brotherhood continues in ignoring its duty to the present time.

XX.

The Pennsylvania Railroad Company violated its agreement to equalize pay between the Eastern and Central Regions with the knowledge that it would suffer no repercussions since its former company union officers (now Brotherhood officers) would take no action against the company without the company's permission. As a result of this wanton disregard by the defendants of the purposes of the Railway Labor Act, each plaintiff has suffered losses in wages since 1950 amounting to $2,890 and for each month in the future that this agreement remains unenforced approximately $30. (Since the aforesaid agreement was consummated, there have been several wage increases.) A

minimum of 600 persons on the Eastern Region comprise this class. Hence, damages to date aggregate $1,734,000 without interest.

WHEREFORE, Plaintiffs on their behalf and all those similarly situated demand relief as follows:

1. Mandatory injunction compelling defendant Pennsylvania Railroad Company to equalize the pay scale for "tallymen" between the areas formerly known as the Central Region and the Eastern Region.

2. Damages against the Pennsylvania Railroad Company for losses in earnings for a minimum $1,734,000.

3. Interest against the Pennsylvania Railroad Company at 6 per cent from August 1, 1951 to the date of judgment.

4. Punitive damages on item (2) supra against the defendant Brotherhood equal to the judgment assessed against the Pennsylvania Railroad Company for wanton breach of trust and violation of the duty owed to the plaintiffs as agents, and for violating their statutory duty.

5. An order compelling the defendant Brotherhood to return dues collected from plaintiffs for the period in question since defendant gave plaintiffs no quid pro quo for these union dues.

6. Such other and further relief as the Court may determine to be necessary in the premises.

/s/ LAWRENCE J. RICHETTE.
Attorney for Plaintiffs.

EXHIBIT "A".

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary
Treasurer

G. R. Kershaw,
Senior Vice General Chairman
G. M. Hill,
Vice General Chairman
M. C. Renkenberger,
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD OF ADJUSTMENT
1214-16 Clark Bldg.—717 Libert Ave., Pittsburg 22, Pa.
File 4.114 Eastern Region
Subject: Piecework on Tonnage
Rates of Pay ——
Philadelphia Transfer
April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Region
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the agreement

of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

> "We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location."

In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

Will you please advise if you concur.

Yours truly,
s/ S. V. M. Loehr
General Chairman

Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S.V.W.L.
Above letter found at X 162-163 of original Record C. P. #1, Dec. Term, 1953, No. 6298.

AMENDMENT.

In accordance with Federal Rules of Civil Procedure No. 15 Plaintiffs amend paragraph IX of the above captioned Complaint by adding the following:

However the Pennsylvania Railroad Company in 1951, despite its failure to equalize the pay rates between the Eastern and Central Region did eliminate tonnage payments to tallymen contrary to the collective bargain dated July 29, 1941 and contrary to the Railway Labor Act.

/s/ LAWRENCE J. RICHETTE
MEEHAN, NEIL & RICHETTE.

H.

II. Petition for Clarification of Judgment to allow Plaintiffs to Amend their Complaint in the lower court.

Plaintiffs, by their attorneys, Meehan, Neil & Richette, Esquires pray that the court amend its judgment—in the event that it is disposed not to grant a rehearing—allowing the Plaintiffs to file the following amended Complaint in this cause: As authority for this prayer, the court is respectfully requested to review the following cases wherein Circuit Courts allowed Amended Complaints to be filed in the lower courts: *Alderman et al. v. Elgin, J. & E. Ry. Co.*, 125 F. 2d 971—this is the forerunner of the landmark case of *Elgin et al. v. Burley*, 325 U. S. 711; *Dollar SS Lines, Inc., et al. v. Merz*, 68 F. 2d 594.

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 26133.

JAMES A. GAINEY, 1016 Sheridan Street, Camden, N. J.
and
J. L. YOUNG, 1237 North 53 Street, Philadelphia, Pa., individually and on behalf of others similarly affected, Plaintiffs

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, Philadelphia, Pa.
and
THE PENNSYLVANIA RAILROAD COMPANY, Philadelphia, Pa.

AMENDED COMPLAINT.

Come now the Plaintiffs, James A. Gainey and J. L. Young, individually and on behalf of those similarly affected and complain against the defendants as follows:

I.

This is a civil action arising under the constitution and laws of the United States, more particularly the Plaintiffs

allege that the defendants have violated 45 United States Code 151 et seq. (The Railway Labor Act), and the Fifth Amendment to the United States Constitution.

II.

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Brotherhood) is a voluntary unincorporated Association, the statutory representative under the Railway Labor Act of the Plaintiffs and others similarly situated.

III.

This is a True Class Action in that the Plaintiffs sue for themselves and a class of persons—over 600—too large to bring before the court, all of whom are represented by the Brotherhood and either were or now are employed by the Pennsylvania Railroad; this class derives its rights from the Railway Labor Act for the reason that at all times pertinent hereto they were employees of the Pennsylvania Railroad and members of the Brotherhood; and these two defendants were signatories to a nationwide collective bargain still in existence dated, May 1, 1942 defining the rights and obligations of the parties thereto for and on behalf of the Plaintiffs and others similarly situated.

IV.

The Brotherhood defendant maintains an office at the Lewis Tower Building, 15th and Locust Streets, Philadelphia, Pa., which is the Philadelphia headquarters of the so-called System Board of Adjustment for the Pennsylvania

Railroad, and is there represented by officers and staff members of the Brotherhood, and is thus doing business within the Eastern District of Pennsylvania; while the defendant Pennsylvania Railroad is a Pennsylvania corporation with offices at 30th and Market Street, Philadelphia, Pennsylvania, doing business within the Eastern District of Pennsylvania and like the Brotherhood is subject to the commands of the Railway Labor Act.

V.

The jurisdiction and venue of this Court are invoked pursuant to Title 28, United States Code, Section 1331, this being a suit in equity under the Constitution of the United States and the laws of the United States, viz., the Fifth Amendment of the Constitution and 45 United States Code, Section 151 et seq.—The Railway Labor Act, wherein the matter in controversy exceeds the sum of $10,000.

The rights sought to be redressed against the Brotherhood are: (1) the right to be represented with fairness and impartiality, equal with all other tallymen on the Railroad (2) the right not to be discriminated against because Plaintiffs belonged to lodges which had rebelled against Grand Lodge leadership, said discrimination consisting in failing to equalize pay between two regions on the Railroad to the pecuniary detriment of Plaintiffs, being part of a plan to destroy opposition among the Plaintiffs and other crafts in this Brotherhood of the Eastern Region (3) the right to expect a statutory representative to do its duty—irrespective of the personal feelings of the Grand President and the General Chairman—toward the Plaintiffs and others in this class—and immediately invoke the services of the National Mediation Board when a railroad refuses to further negotiate a collective bargain—if the latter is a fact, which Plaintiffs want Discovery for purposes of ascertaining (4) the right to expect the statutory representative to seek im-

mediate judicial injunction preventing the carrier from unilaterally terminating a collective bargain, contrary to section 6 of the Railway Labor Act (5) the right to expect a statutory representative to set aside its prejudices against Eastern Region members and thereby give these members a hearing when they protest the illegal actions of their General Chairman in failing to complete negotiations on their behalf for a new collective bargain in lieu of one illegally terminated by the carrier (6) the right to expect the statutory representative to afford a hearing, consistent with due process, on the complaints of Plaintiffs against their General Chairman and the Pennsylvania Railroad and within a reasonable time thereafter render a decision so that the Plaintiffs could appeal this action from the Grand President's decision to the Grand Executive Council for review, and from there to the quadrennial convention of the Grand Council (7) the right to expect the decisions from these various appeal levels within reasonable time limitations so that members may seek judicial relief of the decisions of the various union appellate bodies (8) the right to damages against the union for their failure to act in accordance with the commands of the Railway Labor Act.

The rights sought to be redressed against the Pennsylvania Railroad are: (1) the right to have judicially determined whether or not it may unilaterally terminate an existing collective bargain (2) Whether this termination is void since the carrier failed to give notice as required under section 6 of the Railway Labor Act (3) the right to have judicially determined whether or not the carrier and the Brotherhood Division Chairman had a meeting of the minds with respect to a new agreement to take the place of the old one unilaterally terminated by the carrier (4) the right to have judicially determined when this new agreement—if one was made, and Plaintiffs request Discovery to determine this fact—was consummated and when it was to go into effect and what its full terms were (5) the right to have judicially determined if no new agreement

was consummated why the Railroad did not invoke the services of the National Mediation Board and the other provisions of the Railway Labor Act as to arbitration and conciliation (6) the right to have a judicial determination as to whether or not the carrier must answer in damages for all the losses Plaintiffs have suffered for its failure to equalize pay rates for Eastern Region tallymen with those in the Central Region (7) the right to have judicially determined whether or not the Pennsylvania Railroad and the Brotherhood did not act with malice aforethought to deceive and deprive the Plaintiffs of their rights under the Railway Labor Act and hence liable in damages to the Plaintiffs for exemplary and punitive damages at least equal to the actual losses suffered by the Plaintiffs since 1950.

VI.

All the Plaintiffs were at all times pertinent hereto tallymen on the Eastern Region of the Pennsylvania Railroad, during which time they were members of the Brotherhood and enjoyed the rights of the aforementioned national collective bargain dated May 1, 1942, and the rights of all railroad workers as defined by Congress.

VII.

Prior to July 29, 1941 Tallymen—railroad workers who check freight in railroad cars—in the Eastern Region of the Pennsylvania Railroad (East of Altoona to New York and south to Washington, D. C.) received less pay than their counterparts in the Central Region (West of Altoona to Chicago). As a matter of fact, Eastern Region Tallymen received hourly rated pay of $1.44 per hour while the Central Region Tallymen received $269.17 per month, along

with paid vacations, depending upon length of service and paid sick time. The Eastern Region Tallymen did not have these latter benefits. With the advent of World War II the Pennsylvania Railroad desiring to speed the handling of freight entered into an agreement with the Brotherhood on behalf of the Tallymen, agreeing to pay the Tallymen on the Eastern Region a bonus for every ton of freight checked, over and above their hourly rate of pay, viz. $1.44. That agreement was placed into effect on July 29, 1941. The effect was to at least equalize the pay between the Eastern and Central Regions on the carrier for Tallymen.

After World War II, the Pennsylvania Railroad's freight handling was reduced to normal and they expressed a desire to abrogate the agreement of July 29, 1941.

VIII.

The first meeting for the purpose of negotiating a new collective bargain to replace the agreement of July 29, 1941 took place on February 15, 1949. Mr. S. V. W. Loehr, General Chairman of the Brotherhood represented the Tallymen on the Eastern Region, and Mr. W. Stewart, Superintendent of Stations, represented the Pennsylvania Railroad. Though all the terms of the agreement are not known to the Plaintiffs—and they request Discovery to determine the exact terms—Mr. S. V. W. Loehr did communicate to Plaintiffs' representative, Division Chairman Joseph P. Zawada that the carrier wanted to eliminate the bonus payments for tallying freight and in lieu thereof give the same pay to Eastern Region tallymen which the Central Region tallymen were then receiving. The Division Chairman polled the membership and after receiving their favorable assent to this agreement communicated this to Mr. Loehr who in turn told the Pennsylvania Railroad that the agreement was acceptable to the Plaintiffs. On April 21, 1950 Mr. Loehr confirmed this understanding by a letter to the

General Manager of the Eastern Region of the Pennsylvania, a copy of this letter is attached hereto and marked Exhibit A. Plaintiffs are unaware of what followed this letter, except that they are informed that some official on the railroad balked at equalization of pay for Plaintiffs. They learned of this fact from testimony given by Mr. Loehr in the *Grand Lodge v. Girard Lodge* case wherein the locals of which Plaintiffs were members had their charters revoked by the Grand President in 1954. A copy of Mr. Loehr's testimony in that case is attached hereto and marked Exhibit B.

IX.

In or about the summer of 1950 the Pennsylvania Railroad without giving notice as required in section 6. of the Railway Labor Act unilaterally terminated the bonus agreement of July 29, 1941. Moreover, it failed to put into effect the agreement outlined in the letter found at Exhibit A. or any other agreement which might have replaced the bonus agreement. As a result the Eastern Region Tallymen since the summer of 1950 have been receiving hourly rates of pay as they were prior to July 29, 1941, no vacation pay and no sick paid leave, thus earning approximately $25 per month less than their counterparts in the Central Region, and experiencing a less favorable position on the Seniority Roster.

X.

The defendant Brotherhood failed to invoke any of the procedures of the Railway Labor Act at this willful violation of that Act by the Pennsylvania Railroad. It could have sought an injunction for the carrier's failure to give notice under section 6. of the Act of its desire to terminate

a collective bargain. It could have invoked the services of the National Mediation Board, failing which it could have sought Arbitration and Conciliation as provided by the Act. But the Brotherhood deliberately did nothing to prevent the monetary losses suffered by the Plaintiffs as a result of this unilateral act of the carrier.

XI.

Plaintiffs believe and therefore aver that the action of the Brotherhood in failing in its statutory duty to collectively bargain on behalf of Plaintiffs was a deliberate act of collusion with the carrier to defeat their rights under the old collective bargain and thus effectively punish Plaintiffs for being part of the rebellion in the Eastern Region against the leadership in the Brotherhood.

XII.

Since the Brotherhood has the collective bargaining rights under the Act, the plaintiffs are powerless to compel the defendants to negotiate a new agreement to replace the July 29, 1941 bonus agreement, since under the Act only the collective bargaining representative may negotiate agreements. Individuals are restricted to actions only as to grievances under existing agreements. An individual may not invoke the services of the National Mediation Board or any other collective bargaining provision of the Act.

XIII.

Division Chairman Joseph P. Zawada on behalf of Plaintiffs upon learning of the carrier's abrogation of the July 29, 1941 agreement without first substituting for it a new

equalization of pay agreement, requested of the General Chairman a clarification of his views as to what action was to be taken to compel the carrier to replace the old agreement. Mr. Loehr categorically told Mr. Zawada it was not his affair and refused thereafter to discuss the matter with him. That winter of 1950 Mr. Zawada wrote to the Grand President, George M. Harrison telling him of the continuous rebellion on the Eastern Region because of the failure of the General Chairman to present grievances of members and because of this statutory violation of the railroad relative to the Tallymen. After many communications of this nature the Grand President finally acquiesced and sent two Vice-Presidents of the Brotherhood to hear the evidence against Mr. Loehr. Two full days of testimony were taken at which the substance of this complaint was aired. A report was filed with the Grand President by these two agents.

Mr. Zawada then in early 1951 and thereafter for a period of two years repeatedly requested the Grand President to determine whether or not anything could be done to compel the carrier to re-open negotiations on behalf of the Eastern Region Tallymen, and to compel Mr. Loehr to act on behalf of the Plaintiffs in accordance with the statutory duty of the Brotherhood. But Mr. Harrison refused to acknowledge Mr. Zawada's requests. In 1954 Mr. Harrison revoked the charters of the Philadelphia locals in which many of the Plaintiffs held membership.

In 1958, counsel for the Plaintiffs, Mr. Lawrence J. Richette, Esquire, of the Philadelphia Bar, at a special conference with Mr. Harrison, the Grand President, again requested a decision from him as to the General Chairman's inaction relative to this complaint. None was given, and none has been given to Mr. Zawada, counsel, or any member of the class represented by Plaintiffs.

XIV.

Since the Grand President has refused to render a decision since 1950 on this complaint, the Plaintiffs are unable to appeal his decision to the Grand Executive Council, which is the next appellate body in the Brotherhood, the next and last appeal being to the quadrennial Convention. There have been two such conventions since this action commenced in 1950. The Brotherhood constitution states that an appeal from the decision of the Grand President may be had to the Grand Executive Council. Since the Grand President has not rendered any decision—affirmative or negative—no appeal can be made to this body. Moreover, even if the Grand President, after these ten years, were to render a decision it would be vain and illusory to attempt an appeal since all the members of the Executive Council approved the Grand President's action in revoking the charters of the locals in which many of the Plaintiffs were lodged, and this council is made up of Vice Presidents selected by the President.

XV.

The Brotherhood violated its stautory duty and the Fifth Amendment to the United States Constitution (equal protection of the law clause) when it failed to negotiate or consummate an agreement equalizing the pay between the Eastern and Central Regions for Tallymen; it is guilty of violating the Act by allowing irrelevant and invidious differences—geographic—to remain in the collective bargain; it is guilty of discrimination in that it refuses to bargain collectively for its members in the Eastern Region, while it bargains collectively for all other members of the Brotherhood outside of this region. And it does this for the reason that it wishes to punish a segment of its membership which

dares rise in revolt at its poor leadership, knowing that it is safe so long as judicial action is not taken by the class, since under the Act only the Brotherhood, which has the collective bargaining rights, has power to rectify this irrelevant and invidious discrimination between the two regions which has existed for ten years.

XVI.

The carrier violated its statutory duty to negotiate a new agreement to equalize pay to replace the old bonus agreement; it violated the statute when it unilaterally abrogated the agreement without first complying with section 6 of the Act. By this wanton disregard of Plaintiffs' rights, it has deprived the Plaintiffs of approximately $25 per month in added pay since the summer of 1950, and an average of two weeks pay for vacation time, and a minimum of one week's pay for sick leave. Since there are more than 600 members for whom this suit is brought, the damages actually suffered by Plaintiffs in this class suit are well over two million dollars, without interest, exemplary or punitive damages.

WHEREFORE, Plaintiffs on their behalf and all those similarly situated request relief as follows:

1. A judicial determination by way of a declaratory judgment or otherwise of whether or not the Railroad and the Brotherhood had consummated a new equalization of pay agreement to be substituted for the old bonus agreement of July 29, 1941;

2. A judicial determination of whether or not the Railroad violated the Act when it failed to give notice that it wished to abrogate the July 29, 1941 agreement;

3. A judicial determination of whether or not the Railroad and the Brotherhood were in collusion to defeat the rights of the Plaintiffs in the new agreement and under the old one which was unilaterally cancelled by the carrier.

4. A judicial determination of whether or not the Brotherhood acted with malice in failing to compel the Railroad to continue negotiating the new agreement;

5. A judicial determination of whether or not the Brotherhood in concert with the Railroad deliberately maintained the irrelevant and invidious discriminatory pay differential between the Eastern and Central Region Tallymen.

6. A judicial determination of why the Brotherhood failed to invoke any of the provisions of the Act to bring about a resolution of this dispute between the Plaintiffs and the Railroad.

7. To assess damages against the carrier for the exact losses of the 600 plaintiffs for ten years i.e., $1,800,000 losses in salaries and $1,080,000 in lost vacations and sick leave, and punitive and exemplary damages in an equal sum against the Brotherhood and a return of union dues collected from Plaintiffs by the Brotherhood for the past ten years.

8. Such other and further relief as the court may determine necessary in the premises.

/s/ LAWRENCE J. RICHETTE,
MEEHAN, NEIL & RICHETTE.

AFFIDAVIT OF LAWRENCE J. RICHETTE, ESQUIRE ON BEHALF OF PLAINTIFFS.

Lawrence J. Richette, being duly sworn according to law deposes and says that he is counsel for the Plaintiffs and from his own knowledge, information and belief the following facts as well as those in the attached Amended Complaint are true:

1. The Pennsylvania Railroad and the Brotherhood of Railway Clerks entered into a collective bargain in July of 1941 wherein Eastern Region tallymen received bonuses, in addition to their hourly rated pay, based on tons of freight checked.

2. The Pennsylvania Railroad and the Brotherhood of Railway Clerks commenced negotiations on or about Feb. 1949 with the object of replacing the "bonus payments agreement" of July 1941 with an agreement whereby the Eastern Region tallymen would receive monthly salaries equal to the salaries received by tallymen in the Central Region of the Pennsylvania Railroad..

3. The Pennsylvania Railroad violated Section 6. of the Railway Labor Act when it terminated the bonus payment agreement with the Tallymen of the Eastern Region since it gave no notice.

4. The Brotherhood of Railway Clerks confirmed the negotiated terms of the "equalization of pay agreement" in a letter which is attached hereto (Exhibit "A"); but failed to pursue the matter further when the Railroad failed to live up to its terms. See notes of testimony attached hereto (Exhibit "B").

5. Joseph P. Zawada, was Division Chairman of the Philadelphia locals which contained many of the Plaintiff tallymen and it was this lower echelon union officer who in 1950 appealed on behalf of the Plaintiffs to the Grand President, George M. Harrison for a review of the actions of the Railroad and the actions of the General Chairman, Brotherhood of Railway Clerks, S. V. W. Loehr, who allowed the carrier to abrogate the old agreement and terminate negotiations on the new "equalization of pay agreement".

6. As a result of Zawada's protest to the Grand President, the latter sent two Vice-Presidents to Philadelphia who in 1950 during a two day session took lengthy testimony of the dispute between plaintiffs and the Railroad and the General Chairman, S. V. W. Loehr.

7. A report was then given by these two agents of the Grand President to the latter, who took no action on the charges therein.

8. Zawada on behalf of the Plaintiffs then wrote a series of letters and telegrams to the Grand President protesting his failure to render a decision.

9. The Grand President then revoked the charters of the locals in which many of the plaintiffs held membership, and refused to heed any of their complaints against the carrier or upper echelon union officers.

10. Your deponent on behalf of Plaintiffs brought this dispute to the attention of the Grand President at a meeting in the offices of Saul, Ewing, Remick and Saul, local counsel for the Brotherhood, where the Grand President promised to render a decision in the matter. Since that time, 1957, the Grand President has not communicated with your deponent or any member of the class whom Plaintiffs represent. The matter remains undecided to this day.

11. The Constitution of the Grand Lodge of the Brotherhood of Railway Clerks on the problem in question reads:

"APPEALS FROM DECISION OF THE GRAND PRESIDENT

Section 6. Any lodge or member of the Brotherhood feeling aggrieved by the decisions of the Grand President in matters of Law and Equity may appeal to the Grand Executive Council within sixty (60) days after such decision; said appeal to be in writing, the original to be sent to the Grand Secretary-Treasurer and one copy to each member of the Grand Executive Council."

12. An appeal to the Executive Council therefore presupposes that a decision has been rendered by the Grand President. There is no provision in this Constitution for an appeal from the inaction of the Grand President, where he fails to make an affirmative or negative decision.

13. Plaintiffs commenced their suit against the Brotherhood for the reason that the constitution of the Brotherhood gave them no avenue of recourse where their General Chairman fails in his statutory duty and the Grand President refuses to render a decision on this charge for 10 years.

/s/ LAWRENCE J. RICHETTE.
Lawrence J. Richette.

Sworn to and subscribed before me this 2nd day of March 1960.

/s/ ROSE MARIE FALO,
Notary Public.
Philadelphia, Philadelphia Co.
My Commission Expires April 10, 1963.

AFFIDAVIT.

Lawrence J. Richette, Esquire, being duly sworn according to law deposes and says that he is counsel for the Plaintiffs herein and that the Petition for Rehearing and For Clarification of Judgment of this Court to Allow an Amendment of the Complaint in the lower court is not filed for delay but in good faith because he believes that the Court overlooked certain arguments which are presented herein; moreover the deponent states that all the facts contained in the petition as well as in the proposed Amended Complaint are true to the best of his information, knowledge and belief, as each and every fact has been verified by him personally.

/s/ LAWRENCE J. RICHETTE,
Counsel for Plaintiffs.

Sworn to and subscribed before me this 2nd day of March 1960.

/s/ ROSE MARIE FALO,
Notary Public.
Philadelphia, Philadelphia Co.
My Commission expires April 10, 1963.

EXHIBIT "A".

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES

Affiliated with American Federation of Labor

S. V. W. Loehr,
General Chairman
A. B. Seward,
General Secretary
Treasurer

G. R. Kershaw
Senior Vice General Chairman
G. M. Hill,
Vice General Chairman
M. C. Renkenberger,
Vice General Chairman

PENNSYLVANIA RAILROAD SYSTEM BOARD OF ADJUSTMENT

1214-16 Clarke Bldg.—717 Libert Ave., Pittsburgh 22, Pa.
File 4.114 Eastern Region

Subject: Piecework on Tonnage
Rates of Pay —
Philadelphia Transfer
April 21, 1950

Mr. W. L. Nancarrow,
General Manager, Eastern Region
Pennsylvania Railroad Company
409 Pennsylvania 30th Street Station
Philadelphia 4, Pennsylvania

Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949

with respect to our desire to abrogate the agreement of July 29, 1941 with respect to tonnage rates of pay applicable to certain positions at Philadelphia Transfer, Philadelphia Terminal Division, and to substitute in lieu thereof a new agreement to be effective as of March 1, 1949.

We quote from your letter:

> "We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employees if the tonnage rates were eliminated entirely at this location."

In accordance with our discussion at our meeting in Philadelphia, Pennsylvania on April 18, 1950 we are agreeable to your suggestion. This is based on our understanding that the rate of pay for tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly rated employees in the Central Region will be granted these employees. We suggest that this entire arrangement be made effective as of May 1, 1950.

Will you please advise if you concur.

Yours truly,
/s/ S. V. M. Loehr
General Chairman

Blind copy to:
Mr. Geo. M. Harrison, G.P.
Members Executive Committee
Mr. J. C. McGuigan, A.G.C.
Mr. J. P. Zawada, D.C.
Mr. E. L. Livingston, Pres. #6319
Brother Zawada's letter of April 19, 1950 refers. S. V. W. L.

Above letter found at X 162-163 of original Record C. P. #1, Dec. Term, 1953, No. 6298.

EXHIBIT "B".

At page 909a, *Grand Lodge, et al. v. Girard Lodge, et al.* (Court of Common Pleas No. 1 of Philadelphia County, No. 6298, December Term, 1953, (384 Pa. 248) Mr. Loehr testified as follows:

"Q. The third item related to the Tallymen; I think Mr. Zawada said there was an offer to eliminate this tonnage commission arrangement and give the Tallymen in this area the same rates as the Tallymen were being paid in the central region—I assume those rates were higher in the central region.

A. Yes.

Q. Was there a proposal to eliminate this tonnage plan or commission basis, and how did that proposal originate?

A. It originated as a result of our request to revise the tonnage agreement here in Philadelphia. The Carrier—when I say the Carrier, the General Manager with whom I dealt here wrote me a letter suggesting that the tonnage be eliminated. That letter was a letter in about 195—I have forgotten the date.

Q. Did you have a meeting with the General Manager on that subject?

A. Yes, I did.

Q. Do you remember the date of the meeting?

A. I said the General Manager; it was one of the members of his staff, to be explicit.

Q. Who was it?

A. It was Superintendent of Stations and Transfers, Mr. Stewart.

Q. That meeting was held in Philadelphia and was Mr. Zawada present?

A. Not at that particular meeting; there was a meeting on that day at which Mr. Zawada was present, but

this was something that happened at a further meeting on the same day.

Q. What arrangement, if any, did you work out with Mr. Stewart on this proposal to eliminate tonnage?

A. Well, I told Mr. Stewart that if the Railroad agreed to get rid of the tonnage here, I would be glad to do so for a price.

Q. What price did you ask?

A. I asked that he would pay the central region rates to tallymen, which are higher in the central than here in the Philadelphia area.

Q. What did Mr. Stewart say?

A. He agreed.

Q. Did you advise Mr. Zawada on the same day?

A. I called Mr. Zawada—I'm hazy about whether I called by telephone or spoke to him directly, but it was one or the other, and explained to him that the proposal was made to me.

Q. He took it up with his people and reported back to you?

A. He took it up with his protective committee, or Division committee, or whatever he holds these meetings with, and reported back to me it was acceptable.

Q. Then what happened between you and the Railroad?

A. Then I called Mr. Stewart and also the Central Manager's representative on the Personnel matters, who was Mr. Alexander at that time, and informed them that I would accept that offer, and that as soon as I returned to Pittsburgh I would confirm it in writing.

Q. Did you?

A. I did, sir.

Q. What happened?

A. I received a reply from the Central Manager that indicated that he didn't want to go all the way with what one of his subordinate officers agreed to do.

Q. Did you have a subsequent meeting and correspondence with the Railroad in an effort to put through the verbal agreement you had arrived at?

A. I did.

Q. Did the Railroad ever agree to do so?

A. They did not.

Q. What finally happened to the matter?

A. Closed up the Philadelphia transfer.

Q. Which was the only spot at which this tonnage was being paid?

A. That's correct.

Q. So you never did get this agreement through with the Railroad; is that right?

A. That's correct."

I.

¶1254 28 U. S. C. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Act of June 25, 1948 C646 (62 Stat. 928).

FILE COPY

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MAY 14
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 873.

JAMES A. GAINEY and J. L. YOUNG, Individually and on Behalf of Others Similarly Affected,

Petitioners,

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

and

THE PENNSYLVANIA RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND APPENDIX OF RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY.

ROBERT M. LANDIS,
OWEN B. RHOADS,
1600 Three Penn Center Plaza,
Philadelphia 2, Pennsylvania,

RICHARD N. CLATTENBURG,
1138 Six Penn Center Plaza,
Philadelphia 2, Pennsylvania,

Counsel for Respondent, The Pennsylvania Railroad Company.

BARNES, DECHERT, PRICE, MYERS & RHOADS,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 873.

JAMES A. GAINEY AND J. L. YOUNG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY AFFECTED,
Petitioners,

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

AND

THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 275 F. 2d 342 (1960). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 177 F. Supp. 421 (1959).

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) upon a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE.

This action under the Railway Labor Act, 45 U. S. C. § 151 *et seq.* was brought by petitioners in the United States District Court for the Eastern District of Pennsylvania on behalf of themselves and some six hundred other "tallymen" against their collective bargaining representative, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and their employer, The Pennsylvania Railroad Company. The complaint sought damages against the Railroad for alleged loss of earnings since August 1, 1951 and a mandatory injunction compelling the Railroad to equalize the wages paid to tallymen employed in its Eastern Region with those paid to tallymen in the Central Region. Petitioners demanded an equal sum from the Brotherhood as punitive damages.

Summarizing the material averments of the complaint, petitioners alleged the following facts: They and other tallymen have been employed by the Railroad since August 1, 1950 under a collective bargaining agreement between the Brotherhood and the Railroad which was entered into on May 1, 1942 (Paragraph VI, p. 45).[1] Prior to and since August 1, 1950 tallymen were paid at different rates of pay for the same work, so that hourly rated tallymen in the Eastern Region of the Railroad received $24.09 less wages per month than the salaried tallymen employed in the Central Region (Paragraph VII; pp. 45-46).

This geographical differential in rates became the subject of a dispute between petitioners and the Railroad, and the General Chairman of the Brotherhood "proceeded to negotiate a settlement of the dispute" (Paragraph VIII, p. 46). "On August 1, 1951, an agreement was consummated" with the Railroad by the Brotherhood General

1. The paragraphs referred to are contained in the original complaint. All page references, unless otherwise noted, are to the pages of petitioners' appendix to petition for a writ of certiorari.

Chairman on behalf of petitioners, and this "understanding" was "reduced to writing" and attached to the complaint as Exhibit A (Paragraph VIII, p. 46). Exhibit A of the complaint is a letter from the Brotherhood General Chairman to the Railroad in which he reviewed certain bargaining proposals pertaining to the elimination of tonnage rates and equalization of pay rates for tallymen in the Eastern Region with those in the Central Region, and "suggest[ed]" that the proposals be made effective as of May 1, 1950. The letter concluded with the statement, "Will you please advise if you concur" (Exhibit A, p. 53).

The complaint then charged that the pay rates were never equalized, although tonnage payments to the Eastern Region tallymen were eliminated (Paragraph IX, p. 47, p. 54), and it further alleged that the Brotherhood has never taken any steps to compel the Railroad to abide by the so-called "agreement" because the Railroad "could control union officers at will." (Paragraph XIII, p. 48).[2]

Both defendants filed motions to dismiss the complaint.[3] The Railroad's motion averred among other things that the District Court had no jurisdiction over the subject matter of the action because the National Railroad Adjustment Board has exclusive jurisdiction under the Railway Labor Act to interpret agreements pertaining to wages; that the complaint failed to state a claim upon which relief could be granted because the alleged agreement was not a legally effective contract; that petitioners had failed to invoke and exhaust their administrative remedies under the collective bargaining agreements and the Railway Labor Act; and that the claims were barred by laches and by the applicable

2. Petitioners' statement of the case misstates the material allegations of the complaint (Petition, pp. 3-4). Judge Goodrich's opinion for the court below fairly and accurately summarizes these allegations (Petitioners' Appendix, pp. 32-38).

3. The grounds of the Brotherhood's motion to dismiss are not material to the issues between petitioners and the Railroad and are therefore not specified.

statutory and contractual limitations upon the filing of claims and suits of this kind (Appendix to Railroad's Brief in Opposition to Petition, pp. 1a-15a).

The District Court granted both defendants' motions and dismissed the complaint. As to the complaint against the Railroad it held that the Railroad Adjustment Board had exclusive jurisdiction to interpret agreements pertaining to wages; that the so-called "agreement," attached as Exhibit A to the complaint, was not a contract at all, but at best an offer to enter into a contract; and that the plaintiffs had failed to show exhaustion of their administrative remedies under the collective bargaining agreements and the Railway Labor Act (Petitioners' Appendix, pp. 22-28, p. 32).

In addition to these dispositive grounds, the District Court noted that there were other "formidable" defenses to the complaint set forth in the defendants' motions, such as the defenses of laches, statute of limitations, and the limitation provisions of the collective bargaining agreements, not to mention the dubious propriety of the spurious class action averred in the complaint (Petitioners' Appendix, pp. 20-21).

The Court of Appeals (Judges Goodrich, McLaughlin and Kalodner) affirmed the judgment of the District Court in an opinion by Judge Goodrich. The court held that the complaint as to the Railroad Company had to be dismissed because the National Railroad Adjustment Board has exclusive jurisdiction of disputes between railroad employees and their employer concerning the interpretation of agreements concerning rates of pay, and that the so-called "agreement" on which the complaint was based was not an enforceable contract under general principles of contract law or the applicable decisions of the courts of Pennsylvania, the state in which the letter constituting the alleged agreement was composed, mailed and received (Petitioners' Appendix, pp. 33-38). The court also noted without elaboration "all the other bases of defense brought before both

the district court and this Court" (Petitioners' Appendix, p. 38).[4]

After the court below denied their petition for a rehearing, petitioners filed this petition for certiorari.

REASONS FOR DENYING THE WRIT.

This is a simple case involving well established precedents under the Railway Labor Act and general principles of contract law. Nothing about it would justify review by this court on writ of certiorari (Rule 19, Revised Rules of the Supreme Court of the United States).

As recently as last year this court in *Pennsylvania R.R. v. Day*, 360 U. S. 548 (1959), and *Union Pacific R.R. v. Price*, 360 U. S. 601 (1959), reaffirmed the principle laid down in *Slocum v. Delaware, L. & W. R. R.*, 339 U. S. 239 (1950), and *Order of Railway Conductors v. Southern R. R.*, 339 U. S. 255 (1950), that the National Railroad Adjustment Board has exclusive primary jurisdiction of disputes between employees and carriers concerning the interpretation of provisions of collective bargaining agreements in the railroad industry. Bound by these precedents, the court below accepted the averments of the complaint at face value, and held that the District Court had no jurisdiction over the subject matter of the suit.[5]

The complaint was based upon an allegation that the Railroad and the Brotherhood had entered into an "agreement" providing for equalization of pay rates for tallymen in the Eastern Region with those paid to tallymen in

4. Since the basis for affirming the judgment in favor of the Brotherhood does not concern the Railroad, no reference need be made to it here.

5. As Judge Goodrich observed in the opinion of the court below, quoting from petitioners' own brief, "The plaintiffs, themselves, acknowledge that 'disputes between carriers and their employees as to interpretation of existing agreements must be referred to the National Railroad Adjustment Board'." (Petitioners' Appendix, p. 34).

the Central Region of the Railroad. Paragraph VIII of the complaint, which is the crux of petitioners' suit, averred that "on August 1, 1951, an agreement was consummated" between the Railroad and the Brotherhood providing for such equalization of rates (p. 46). Exhibit A attached to the complaint purported to set forth the terms of the "agreement" (pp. 52-53), and petitioners repeatedly invoked this agreement elsewhere in their complaint (Paragraphs IX, XIII, XIV, XVI, pp. 47, 48, 49), describing it as a "consummated" agreement (Paragraphs X, XVIII, pp. 47, 49). Their claim for damages against the Railroad was for the losses in wages which they attributed to the Railroad's failure to abide by this agreement since the time it was allegedly made almost ten years ago (Paragraph XX, p. 50).

Construing these averments of the complaint in light of the provisions of Section 3, First (i) of the Railway Labor Act, 45 U. S. C. § 153, First (i), which provides that disputes "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" shall be referred to the National Railroad Adjustment Board, the court below held that this section of the Act was "a seemingly insurmountable defense of the Railroad to this suit" (Petitioners' Appendix, p. 33). Under the decisions of this court, the Court of Appeals was bound to reach this conclusion. Its judgment certainly does not warrant review of this principle, which has so recently been reexamined by this court.

Quite apart from this "insurmountable" jurisdictional barrier, the complaint failed to state a cause of action because the so-called "agreement" on which it was based was not a legally enforceable contract. Exhibit A, attached to the complaint, was a letter of the Brotherhood General Chairman to the Railroad General Manager, dated April 21, 1950, which was the purported "contract". The court be-

low quoted the letter in its entirety in its opinion, and concluded that it was not a contract, but "simply an invitation for further comment from the Railroad official to whom it is addressed" (Petitioners' Appendix, p. 36). It based this conclusion on general principles of contract law, *Restatement, Contracts*, §§ 2, 19, 20, 22, 24, 60 (1932), and the applicable decisions of the courts of Pennsylvania, the state in which the letter was composed, mailed, and received. *Cohn v. Penn Beverage Co.*, 313 Pa. 349, 169 Atl. 768 (1934); *Selig v. Philadelphia Title Ins. Co.*, 380 Pa. 264, 111 A. 2d 147 (1955); *United Mercantile Agencies, Inc. v. Slotsky*, 121 Pa. Super. 1, 182 Atl. 788 (1936); *Alexanian v. Fidelity-Philadelphia Trust Co.*, 152 Pa. Super. 23, 30 A. 2d 651 (1943).

Even if the decision of the court below had not been as firmly grounded in these well established principles of contract law as it was, an elementary question of state contract law does not merit the attention of this court under its certiorari power. *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938), cert. denied, 309 U. S. 655 (1940); Rule 19 (b), Revised Rules of the Supreme Court of the United States.

Disregarding the real basis of their suit against the Railroad, as one which arises out of an agreement between the Railroad and the Brotherhood pertaining to wages of tallymen in the Railroad's Eastern Region, petitioners pretend to find a conflict between the decision of the court below with decisions in the Sixth and Seventh Circuits (Petition, pp. 5-6). Far from conflicting with the decision in the instant case, those cases do not remotely concern the issues raised here.

Hunter v. Atchison T. & S. F. Ry., 171 F. 2d 594 (7th Cir. 1948), cert. denied, 337 U. S. 916 (1949), was a suit to enjoin enforcement of an Adjustment Board award because of lack of notice to certain affected employees. The Court of Appeals for the Seventh Circuit held that because there was no such notice to the employees against whom the award

was to be enforced, an injunction against its enforcement should be affirmed.[6] Nothing that was said, let alone held, in the *Hunter* case in any way conflicts with the decision below.

Thomas v. New York, Chi. & St. L. R. R., 185 F. 2d 614 (6th Cir. 1950), was an action by a railroad employee to enforce an Adjustment Board award reinstating him after a wrongful discharge. Such an action under the Railway Labor Act is *de novo*, and because the employee had failed to prove in the trial court that he was wrongfully discharged and failed to prove the terms of the contract of employment which he claimed were violated, the dismissal of his suit was affirmed on appeal. That case has nothing to do with the power of the Adjustment Board to interpret "agreements concerning rates of pay" of the kind alleged in the complaint in this case.

Petitioners also condemn the court below because they say "it utterly failed to distinguish 'major' and 'minor' disputes in the railroad industry" (Petition, p. 7), as if such a distinction would have been germane to the decision in this case. Since petitioners' own complaint was based upon an allegation of a "consummated agreement" pertaining to wages that should be paid to tallymen in the Railroad's Eastern Region, it was obviously not a dispute which had to do with the "bargaining process for a new contract" or the "formation of collective agreements." See *Trainmen v. Chicago R. & I. R. R.*, 353 U. S. 30, 33 (1957); *Elgin J. & E. Ry. v. Burley*, 325 U. S. 711, 723 (1945), aff'd, 327 U. S. 661 (1946). Here, the complaint so plainly asserted a dispute over an allegedly existing agreement concerning tallymen's wages, that it obviously fell within the jurisdiction of

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6. The court said (p. 597):

"The only issue below, as well as here, is whether the Order of the Board is void for failure to give plaintiffs notice of the proceeding, as alleged in their complaint and as found by the court."

the Railroad Adjustment Board, and there was no need for the court below to belabor the distinction between "major" and "minor" disputes, which has been so clearly defined in the decisions of this court.

Finally, petitioners assert as a reason for granting certiorari that the Adjustment Board cannot afford them "complete relief" against the carrier and the Brotherhood (Petition, p. 9). This contention again disregards the basis of their claim against the Railroad, which rests upon its alleged failure to abide by the "agreement" on tallymen's wages. If there *were* such an agreement, its interpretation would be for the Adjustment Board, which could award whatever compensation might be due to petitioners under its provisions. But if, as the court below found, the "agreement" attached as Exhibit A to the complaint was not a legally enforceable contract, neither the Board nor the courts could afford petitioners relief by making a contract for them where one did not exist before.

The decision in this case is firmly grounded on the precedents laid down by this court and general principles of contract law. It presents no novel or important questions with which this court should concern itself on review under its certiorari powers.[7]

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7. The reasons for granting certiorari discussed on pages 10 and 11 of the petition concern only the petitioners' complaint against the Brotherhood and require no comment by the Railroad, since the judgment in favor of the Railroad rests upon other "insurmountable" defenses (Petitioners' Appendix, pp. 33-36).

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

ROBERT M. LANDIS,
OWEN B. RHOADS,
RICHARD N. CLATTENBURG,
Counsel for Respondent,
The Pennsylvania Railroad Company.

BARNES, DECHERT, PRICE,
MYERS & RHOADS,
Of Counsel.

May, 1960.

APPENDIX TO BRIEF FOR RESPONDENT, THE PENNSYLVANIA RAILROAD COMPANY.

MOTION OF DEFENDANT, THE PENNSYLVANIA RAILROAD COMPANY, TO DISMISS THE COMPLAINT.

The Pennsylvania Railroad Company, one of the defendants in this case, moves to dismiss the complaint for the following reasons:

1. This Court has no jurisdiction over the subject matter of this action in that:

(a) The complaint appears to be based upon an alleged agreement pertaining to wages of tallymen represented by defendant brotherhood and employed by defendant railroad, the interpretation or application of which is subject to the exclusive jurisdiction of the National Railroad Adjustment Board, as provided in the Railway Labor Act, 45 U. S. C. 151 et seq.

(b) The collective bargaining agreements between defendant railroad and defendant brotherhood [the relevant excerpts of which are set forth in the attached supporting affidavit], together with the provisions of the Railway Labor Act, have established an integrated hearing and appeals procedure for claims for compensation of the kind involved in this case, and this procedure is the exclusive remedy for the redress of plaintiffs' claimed violation of their rights to compensation.

(c) Under the applicable law, plaintiffs have no recourse to this court's jurisdiction since they have failed to invoke and exhaust their available administrative remedies provided under their collective bargaining agreements and the Railway Labor Act.

(d) There is no diversity of citizenship between the parties.

(e) The complaint shows that the amount in controversy between each plaintiff and this defendant is substantially less than $10,000 exclusive of interest and costs.

2. The complaint fails to state a claim upon which relief can be granted against this defendant in that:

(a) The complaint and its Exhibit A show that the alleged agreement upon which the complaint is based was not a legally effective contract which is enforceable in this court.

(b) The plaintiffs' claims are barred by laches and by the applicable statutory and contractual limitations upon the filing of claims and suits of this kind.

(c) This is not a proper class action because these plaintiffs have no right to represent other employees, nor are they truly representative of any class of employees, for the prosecution of claims of the kind set forth in the complaint.

(d) Whatever rights these plaintiffs might have to enforce any duty of representation against defendant brotherhood, their own collective bargaining representative, cannot provide the basis for a suit against defendant railroad because of any alleged failure of defendant brotherhood to represent them fairly and without discrimination.

(e) Plaintiffs are not legal third-party beneficiaries of any alleged rights arising under the so-called "agreement" referred to in the complaint.

OWEN B. RHOADS,
ROBERT M. LANDIS,
RICHARD N. CLATTENBURG,
Attorneys for Defendant,
The Pennsylvania Railroad Company.

BARNES, DECHERT, PRICE, MYERS & RHOADS,
Of Counsel.

May 15, 1959.

Affidavit in Support of Motion to Dismiss Complaint.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES E. ALEXANDER, being duly sworn according to law, deposes and says:

I am Assistant Director of Labor Relations of The Pennsylvania Railroad Company, one of the defendants in this case, and I am authorized to make this affidavit on its behalf. As Assistant Director of Labor Relations I have under my jurisdiction the conduct and supervision of collective bargaining negotiations with the numerous unions representing employees of The Pennsylvania Railroad Company, including the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereafter referred to as the "Brotherhood of Clerks"). I am personally familiar with the provisions of the various collective bargaining agreements between the railroad company and the Brotherhood of Clerks.

The Agreement of May 1, 1942 between the railroad company and the Brotherhood of Clerks, which is referred to in Paragraph VI of the complaint in this case, contains a regular grievance procedure for the processing of claims for compensation of the kind alleged in the complaint. This procedure is set forth in Rule 7-B-1. Exhibit 1 attached to this affidavit is a true and correct copy of this portion of the collective bargaining agreement of May 1, 1942.

Effective July 1, 1945, the railroad company and the Brotherhood of Clerks entered into a further collective bargaining agreement for the processing of grievances of this kind, providing an additional procedure for appeals from the superintendent, as a supplement to Rule 7 of the Agreement of May 1, 1942. Exhibit 2 attached to this affidavit is a true and correct copy of this agreement.

Effective January 1, 1955, the railroad company and the Brotherhood of Clerks entered into a collective bar-

gaining agreement known as the National Time Limit Rule for the presentation and handling of claims or grievances. Exhibit 3 attached to this affidavit is a true and correct copy of this agreement.

Effective November 1, 1955, the railroad company and the Brotherhood of Clerks entered into an agreement revising Rule 7-B-1 and superseding the provisions of the National Time Limit Rule. Exhibit 4 attached to this affidavit is a true and correct copy of the Agreement of November 1, 1955.

The aforesaid agreements were in effect during the period covered by the allegations in the complaint.

The facts set forth in this affidavit are personally known by me to be true and correct.

/s/ CHARLES E. ALEXANDER,
Charles E. Alexander.

Sworn to and subscribed before me this 14th day of May, 1959.

/s/ W. STEWART BLACKBURN,
Notary Public.

(Seal)

My commission expires July 15, 1962.

Exhibit 1.

EXCERPT FROM AGREEMENT OF MAY 1, 1942.

7-B-1 (a) Claims for compensation alleged to be due, may be made only by an employe or by the "duly accredited representative" as that term is defined in this Agreement, on his behalf, and must be presented, in writing, to the employe's immediate Supervisor within ninety days from the date the employe received his pay check for the pay period involved, except:

1. Time off duty on account of sickness, leave of absence, suspension or reduction in force, will extend the time limit specified in paragraph (a) of this rule (7-B-1) by the period of such time off duty.

2. When a claim for compensation alleged to be due is based on an occurrence during a period employe was out of active service due to sickness, leave of absence, suspension or reduction in force, it must be made, in writing, within ninety days from the date the employe resumes duty.

(b) If claims are not made within the time limit specified in the foregoing paragraph (a) of this rule (7-B-1) including Exceptions (a) and (2), they will not be entertained nor allowed.

(c) When claims for compensation alleged to be due have been presented in accordance with the foregoing paragraph (a) of this rule (7-B-1) including Exceptions (1) and (2), and are not allowed, the employe will be notified to this effect, in writing, within thirty days from the date his claim was presented. When not so notified claims will be allowed.

(d) When time claims are allowed the interested employes and the Division Chairman will be advised in writ-

ing the amounts involved and the payrolls on which the payments will be made.

(e) A claim for compensation denied in accordance with the foregoing paragraph (c) of this rule (7-B-1) will be considered invalid unless it is listed for discussion by the Division Chairman with the Superintendent (in Regional and System General Office Departments and at Altoona Works, the officer in charge of the Department) within ninety days after the date on which the claim was initially denied.

Exhibit 2.

This Agreement is entered into this First day of July 1945, by and between The Pennsylvania Railroad Company and employes of said Company of the classifications designated as Clerical, Other Office, Station and Storehouse Employes, as represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, for the purpose of setting forth the usual manner of handling disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, up to and including the chief operating officer designed to handle such disputes.

It is agreed:

1. This Agreement shall supersede all prior agreements with regard to the usual manner of handling disputes growing out of grievances, or out of the interpretation or application of agreements concerning rules, rates of pay and working conditions.

2. The steps in the said usual manner of handling such disputes will be, successively, with:

(a) Superintendent

(b) General Superintendent

(c) General Manager

(d) General Managers (Joint)

Note: In the System General Office "Division Superintendent", "General Superintendent" and "General Manager" as used in this agreement applies to positions designated as comparable for purposes of orderly handling of disputes.

At Altoona Works "Division Superintendent" as used in this Agreement means Master Mechanic, General Foreman or corresponding officer in the unit of Altoona Works where the question arose; "General Manager" means Works Manager.

In Regional Offices, under the jurisdiction of the General Managers, "Division Superintendent" as used in this agreement means Officer in charge of each Department.

3. Each Superintendent will meet monthly with the Division Chairman, and each General Superintendent and General Manager will meet monthly with the General Chairman, for the purpose of disposing, if possible, of matters coming within the purview of the foregoing and which have been listed, at least ten (10) days in advance, for discussion at such meeting by either party. These meetings will be held on dates scheduled in advance. Decisions of Superintendent, General Superintendent and General Manager shall be rendered, in writing, within forty-five (45) days from meeting at which matter was discussed.

4. Within forty-five (45) days from date requested a submission in the following form will be prepared by the Superintendent and Division Chairman, and by the General Superintendent and General Chairman, as the case may be, covering a controversial matter not disposed of with the Superintendent or General Superintendent respectively:

(a) Subject (which shall specifically set forth the nature of the controversy, and the rule or rules involved).

(b) Joint Statement of Agreed Upon Facts.

(c) Position of Employes.

(d) Position of Company.

5. In addition to "disputes growing out of grievances, or out of the interpretation or application of agreements

concerning rates of pay, rules or working conditions," other questions may be presented and handled in the manner prescribed above, at the monthly meetings.

6. For the purpose of further discussion and possible disposition of disputes growing out of grievances, or out of the interpretation or application of agreements concerning rules, rates of pay, and working conditions which have not been disposed of by handling in accordance with the procedure provided in this Agreement, the General Managers of the several Regions and the New York Zone (jointly) shall meet monthly with the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. The "General Managers" of other departments as described in "Note" under paragraph (2) of this Agreement will also attend these meetings when matters involving their departments are discussed.

7. Matters to be discussed at such meetings shall be listed at least twenty (20) days in advance by either party. These meetings will be held on dates scheduled in advance. Decisions of the General Managers shall be rendered, in writing, within forty-five (45) days from the meeting at which the matter is discussed.

8. This Agreement shall become effective this *1st* day of *July* 1945, and shall remain in full force and effect until changed or terminated as provided in the Railway Labor Act, as amended.

Exhibit 3.

ARTICLE V—CARRIERS' PROPOSAL NO. 7.

Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the conten-

tions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

2. With respect to all claims or grievances which arose or arise out of occurrences prior to the effective date of this rule, and which have not been filed by that date, such claims or grievances must be filed in writing within 60 days after the effective date of this rule in the manner provided for in paragraph (a) of Section 1 hereof, and shall be handled in accordance with the requirements of said paragraphs (a), (b) and (c) of Section 1 hereof. With respect to claims or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs

(b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented, as the case may be, except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred.

3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employee held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

4. This rule recognizes the right of representatives of the Organizations, parties hereto, to file and prosecute claims and grievances for and on behalf of the employees they represent.

5. This agreement is not intended to deny the right of the employees to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency.

Exhibit 4.

7-B-1. (Effective November 1, 1955)

(a) Claims for compensation alleged to be due, may be made only by an employe or by the "duly accredited representative" as that term is defined in this Agreement, on his behalf, and must be presented, in writing, to the employe's immediate Supervisor within ninety days from the date the employe received his pay check for the pay period involved, except:

1. Time off duty on account of sickness, leave of absence, suspension or reduction in force, will extend the time limit specified in paragraph (a) of this rule (7-B-1) by the period of such time off duty.

2. When a claim for compensation alleged to be due is based on an occurrence during a period employe was out of active service due to sickness, leave of absence, suspension or reduction in force, it must be made, in writing, within ninety-days from the date the employe resumes duty.

(b) If claims are not made within the time limit specified in the foregoing paragraph (a) of this rule (7-B-1) including Exceptions (1) and (2), they will not be entertained nor allowed.

(c) When claims for compensation alleged to be due have been presented in accordance with the foregoing paragraph (a) of this rule (7-B-1) including Exceptions (1) and (2), and are not allowed, the employe or the duly accredited representative (when the claim is presented by such representative) will be notified to this effect, in writing, within thirty days from the date his claim was presented. When not so notified claims will be allowed.

(d) When time claims are allowed the interested employes and the Division Chairman will be advised in writing

the amounts involved and the payrolls on which the payments will be made. When time claims are allowed by the Manager of Labor Relations the General Chairman will also be advised in writing the amounts involved and the payrolls on which the payments will be made.

(e) A claim for compensation denied in accordance with the foregoing paragraph (e) of this rule (7-B-1) will be considered invalid unless it is listed for discussion by the Division Chairman with the Superintendent of Personnel (in System General Office Departments the appropriate officer designated) within ninety days after the date on which the claim was initially denied.

(f) Each Superintendent of Personnel will meet monthly with the Division Chairman for the purpose of disposing, if possible, of disputes growing out of grievances, or out of the interpretation or application of agreements concerning rules, rates of pay and working conditions, as well as discipline cases. In addition other questions may be presented and handled at monthly meetings.

These meetings will be held on dates scheduled in advance and the Division Chairman or the Superintendent of Personnel will list in writing to the other party at least ten days in advance subjects for discussion at such meetings. Decisions will be rendered in writing.

(g) When requested, a submission in the following form will be prepared by the Superintendent of Personnel and Division Chairman, covering a controversial matter not disposed of with the Superintendent of Personnel—six copies of each to be furnished to the Division Chairman by the Superintendent of Personnel:

(1) Subject, setting forth specifically the nature of controversy, and the rule or rules involved.

(2) Joint Statement of Agreed Upon Facts, which shall contain all the pertinent facts necessary for the determination of the issues by those who may be

unfamiliar with the situation. If, after a diligent effort, the parties are unable to agree upon a joint statement of facts the parties will state the facts to be separately set forth in the submission.

(3) Position of Employes.

(4) Position of Company.

(h) The Manager of Labor Relations will meet monthly with the General Chairman for the purpose of disposing of matters not settled with the Superintendents of Personnel. The meetings will be held on dates scheduled in advance and the General Chairman or the Manager of Labor Relations will list in writing to the other party at least ten days in advance subjects for discussion at such meetings. Decisions will be rendered in writing.

(i) All claims or grievances involved in a decision by the Manager of Labor Relations shall be barred unless within one year from the date of said officer's decision proceedings are instituted by the General Chairman before the Third Division of the National Railroad Adjustment Board.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 No. 873

James A. Gainey and J. L. Young, Individually and on Behalf of Others Similarly Affected,

Petitioners,

v.

Pennsylvania System Board of Adjustment, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees

and

The Pennsylvania Railroad Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT, PENNSYLVANIA SYSTEM BOARD OF ADJUSTMENT, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

ALLEN S. OLMSTED, 2ND
WALTER BIDDLE SAUL
2301 Packard Building
Philadelphia 2, Pa.
Counsel for Respondent

LEONARD D. SLUTZ
ROBERT S. MARX
[illegible] State Building
[illegible]

IVAR H. PETERSON
[illegible]
[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959. No. 873.

James A. Gainey and J. L. Young, Individually and on Behalf of Others Similarly Affected,

Petitioners,

v.

Pennsylvania System Board of Adjustment, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees

and

The Pennsylvania Railroad Company,

Respondent.

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Does "the peg upon which the plaintiffs hang their case" (a letter from a Brotherhood Officer to a Railroad

Officer) constitute a collective bargain within the meaning of the Railway Labor Act?

(discussed in Pennsylvania Railroad brief)

2. If there was a collective bargain within the meaning of the Railway Labor Act, does jurisdiction to award damages for alleged breach of the collective bargain reside exclusively in the National Railroad Adjustment Board?

(discussed in Pennsylvania Railroad brief)

3. If there was no collective bargain within the meaning of the Railway Labor Act, does the Court have jurisdiction to award damages against the railroad and against the Brotherhood for failure to make such a collective bargain?

(discussed in this brief)

4. Is this suit barred by plaintiffs' failure to utilize their remedies within this union?

(discussed in this brief)

STATEMENT OF THE CASE.

This Respondent adopts as its statement of the case, the first two paragraphs of Judge Goodrich's Opinion, found at pages 32 and 33 of the Appendix to the Petition, and at 275 F 2d 342, p. 343.

ARGUMENT.

The matter of the tallymen's pay (the wage differential between the Philadelphia and Pittsburgh areas, and the abolition of the incentive or tonnage pay when the only station at which it was paid was closed up) has

already been before the Pennsylvania Courts, *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A 2d 523. cert. den. 351 U. S. 985. It was pleaded in the counterclaim as a "derelict failure to act of the Brotherhood," evidence was taken (Appendix to Petition 73-75), the counterclaim dismissed and the dismissal affirmed by the Supreme Court of Pennsylvania, *Grand Lodge* v. *Girard Lodge*, *supra*, at page 268. In that case, as Judge Lord points out (App. p. 19) the main issue was seniority rights at Butler Street Station, and the tallymen's pay was only secondary. Petitioners are urging the same reasons now as then, why this Court should take jurisdiction, to wit, by analogy to *Steele* v. *L. & N. R. R.*, 323 U. S. 192. There is even less reason why this Court should now take jurisdiction than when the matter was last presented to it.

The main reasons, stated by the Court of Appeals, for dismissing the Complaint were (1) that the letter alleged to be a collective bargain ("the peg upon which the plaintiffs hang their case" as Judge Goodrich calls it) was not a contract of any kind, and (2) that plaintiffs did not go to the National Labor Relations Board. These points are discussed in the Pennsylvania Railroad's brief which obviates the need for repetition here.

The ground of dismissal peculiar to the Brotherhood was that plaintiffs have failed to allege exhaustion of their remedies within the union or an adequate reason for failure to do so. This made it unnecessary to decide whether plaintiffs had stated a cause of action under the Railway Labor Act and of the line of cases stemming from *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, and whether the dismissal of the counterclaim based upon the same transactions by the Pennsylvania Courts in *Grand Lodge* v. *Girard Lodge*, *supra*, made the issue technically *res judicata*.

EXHAUSTION OF REMEDIES WITHIN THE UNION.

The Petition states (p. 10) "that their pleas for help *addressed to the union* went unheeded for ten years." (emphasis added). The averment in the Complaint, however, is

> "The plaintiffs have no remedy within the Brotherhood since this *complaint against the Pennsylvania Railroad Company* has gone unheeded by all echelons of the Brotherhood since 1951." (Appendix pp. 48-49, emphasis added.)

The difference is significant. Plaintiffs have not alleged that they even *initiated* Brotherhood procedures, far less that they *exhausted* them. The plaintiffs are averring a reason for failure to use union procedures at all. The reason is quite inadequate, in no wise averring that a proper complaint under normal union procedures would have been ignored.

Plaintiffs belatedly (*i. e.* after the Court of Appeals decision) offer to amend their Complaint. The amendment seeks to tie this controversy into the quarrel between Joseph P. Zawada and his superior officers in the union (Pet. App. 63-64, 67-68, 73-75). This quarrel was the subject matter of *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248 (cert. denied, 351 U. S. 985), and *Zawada* v. *Pennsylvania System Board of Adjustment*, 392 Pa. 207 (cert. denied 358 U. S. 829). In these cases, and also in *Fagan* v. *Pennsylvania Railroad*, 172 F. Supp. 465, 474, the courts have already examined the procedures of this Brotherhood and have found them fair.

Petitioners cite the legislative policy laid down in the new Labor Management Reporting & Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519, Section 10(a) (4). This policy sustains our position, for it reiterates that dissatisfied members must first exercise their rights within

the union. The four month limitation on union procedures contained in the Act has no relevance to members who do not even initiate proceedings.

ALLEGED DISCRIMINATION—THE RULE OF THE STEELE CASE.

Petitioners also seek to bring this case within the rule of *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192. The cases are obviously different. In *Steele* the unions sought to make a collective bargain with "discriminations based on race alone" which "are obviously irrelevant and invidious" (p. 203). This Court recognized that variations *relevant* to the contract are within the scope of the bargaining representation of a craft, and that the contracts might have unfavorable effects on some of the members of the craft, not all of whom are identical in their interest.

This principle was spelled out more explicitly in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, in which the collective bargain favored employees whose military service preceded employment by Ford as compared to those whose employment by Ford preceded their military service. In approving such a discrimination this Court said (p. 338):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view

to long-range advantages, are natural incidents of negotiation."

Just such a case is the case at Bar. A geographical discrimination is averred between the wages of tallymen on the Eastern and Central Division of the Railroad. The dispute also concerns a type of incentive pay known as tonnage rates which were formerly paid at one freight station in Philadelphia. Surely there is nothing invidious about relating the rates of railway workers' pay to the rates of pay of other workers in the area, nor in restricting incentive pay to the operations where such a system is practicable and effective—in this case to a single station handling a large volume of freight.

The essence of the complaint will be found in the prayer for relief (Appendix, p. 51). Plaintiffs ask from the Railroad an increase in the pay of tallymen retroactive to 1951, and punitive damages against the Brotherhood for its failure to have gotten this increase. The group alleged to be discriminated against are identified only by the nature and the place of their labor. There is no suggestion of race discrimination or discrimination based on any other irrelevant or invidious matters. This is a far cry from the *Steele* case. The object of the Railway Labor Act is to bring peace, not war, to the Railroad industry. *Union Pacific Railroad Company* v. *Price*, 360 U. S. 601, 609; *Pennsylvania Railroad* v. *Day*, 360 U. S. 548, 553-554. The rule asked by this plaintiff would require the courts to review the exercise of judgment by thousands of union representatives in ten thousand issues of collective bargaining. It would extend the racial discrimination cases to every conflict of personalities among the union officers.

CONCLUSION.

Respondent Brotherhood of Railway and Steamship Clerks, etc. asks that the petition for certiorari be denied.

Respectfully submitted,

ALLEN S. OLMSTED, 2ND,
WALTER BIDDLE SAUL,
SAUL, EWING, REMICK & SAUL,
2301 Packard Building,
Philadelphia 2, Pa.

LEONARD D. SLUTZ,
ROBERT S. MARX,
900 Tri-State Building,
Cincinnati 2, Ohio.

IVAR H. PETERSON,
1015 Vine Street,
Cincinnati 2, Ohio,
Of Counsel.